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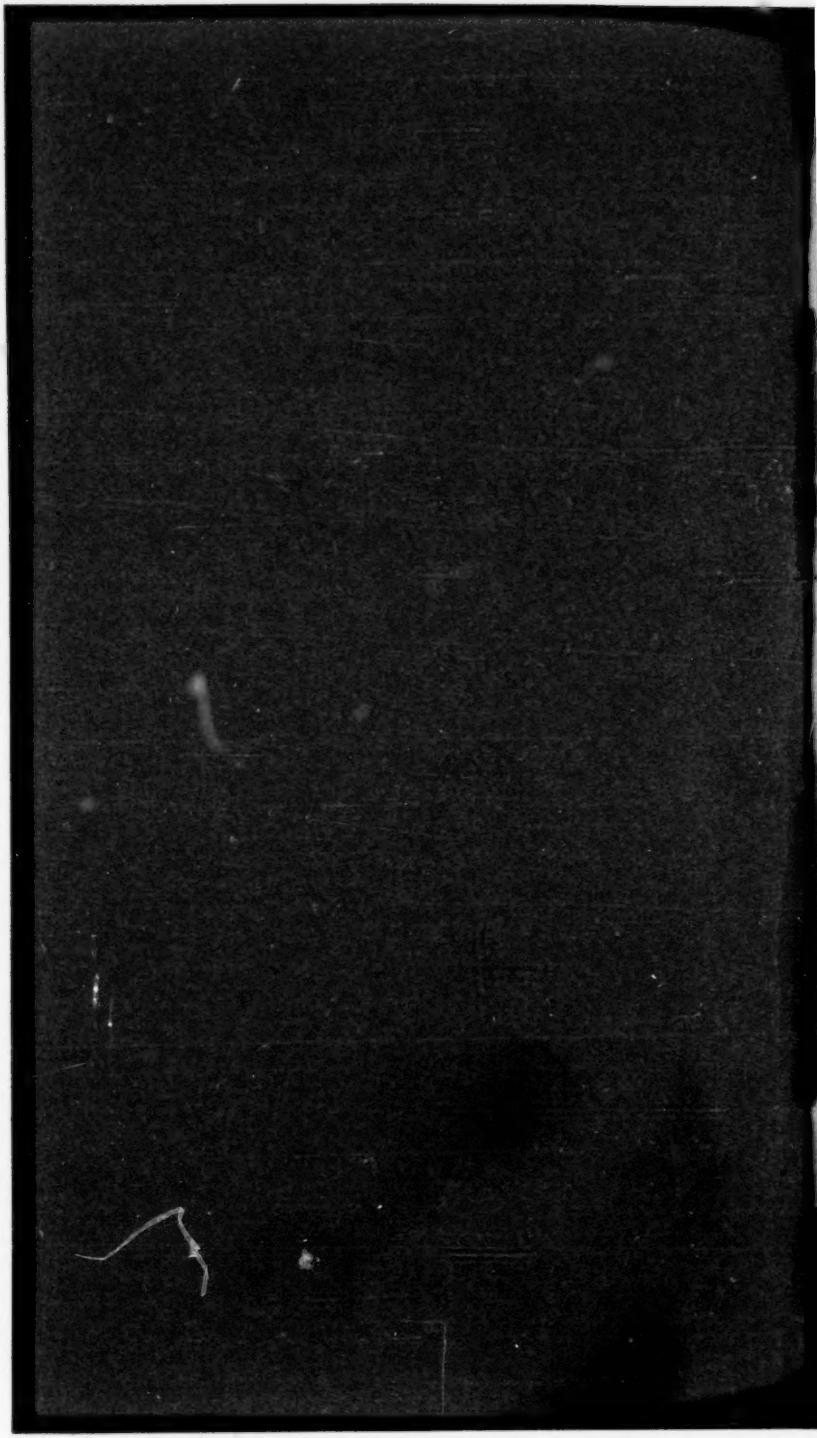
EDWARD S. PRYOR AND EDWARD P. KEARNEY, RE-
CEIVERS OF THE WABASH RAILROAD COMPANY,
PETITIONERS,

vs.

ALLEGA WILLIAMS.

[redacted]



INDEX.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. ———.

EDWARD B. PRYOR and EDWARD F. KEARNEY, Receivers of the WABASH RAILROAD COMPANY,
Petitioners.

vs.

ALLEGA WILLIAMS,
Respondent.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RECORD PAGE

1 United States of America, State of Missouri. } ss.

Be It Remembered, That on the 9th day of December, 1916, there were filed in the office of the Clerk of the Supreme Court of the State of Missouri, in the cause entitled "Allega Williams, Respondent, v. Ed-

ward B. Pryor and Edward F. Kearney, Receivers of Wabash Railroad Company, Appellants", a certified transcript of the judgment of the Circuit Court of Chariton County, Missouri, and of the order allowing an appeal from said judgment to the Kansas City Court of Appeals, printed abstract of the record and record entries in said cause, certified copy of the opinion of the said Kansas City Court of Appeals in said cause, motion for a rehearing filed by the said respondent in said Kansas City Court of Appeals, and a certified transcript of the order of said Court of Appeals overruling said motion for a rehearing and ordering that said cause be certified to the Supreme Court of the State of Missouri for its determination; which said order of the Kansas City Court of Appeals is in the words and figures following, to wit:

2 Kansas City Court of Appeals.
October Term, 1916.

Allega Williams, Respondent, vs. Edward B. Pryor, Rec. of the Wabash Ry. Co., Appellant.	Appeal from Chariton Circuit Court.

Now, at this day, the Court here having fully considered the respondent's motion for a rehearing, doth consider and adjudge that said motion be and the same is hereby overruled. It is further considered and adjudged by the Court that on account of one of the Judges deeming the decision to be in conflict with Fish v. Railway, 263 Mo. 106, 123, it is without

jurisdiction, and therefore orders said cause certified to the Supreme Court for its determination.
State of Missouri—Set.

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, certify that the foregoing is a full, true and complete transcript of the judgment of said Kansas City Court of Appeals, entered of record at the October Term, thereof, 1916, and on the 27th day of November, 1916, in the above-entitled cause.

Given under my hand and the seal of said Court, at the City of Kansas, this 7th day of December, 1916.
(Seal) (Signed) L. F. McCoy, Clerk.

That the said certified transcript of the judgment and order allowing an appeal, so transferred to and filed in the Supreme Court of the State of Missouri, pursuant to the aforesaid order of the Kansas City Court of Appeals, is in the words and figures following, to wit:

3 In the Circuit Court of Chariton County, Missouri, at Salisbury.

Regular February Term, 1916.

Pleas and proceedings made and had in the Circuit Court of Chariton County, at Salisbury, Missouri, at the February Term, 1916, before the Hon. Fred Lamb, Judge of the 12th Judicial Circuit of the State of Missouri, and Judge of this court.

Be It Remembered, that heretofore, to wit, on the 11th day of February, 1916, before the Hon. Fred

Lamb, Judge, the following, among other proceedings, were had in said court, to wit:

Allega Williams,
Plaintiff,
vs.
Edward B. Pryor, Receiver of Wabash Railroad Company,
Defendant.

Cause called, parties answer ready for trial and come the following jury: Ben Nanneman, Paul Harper, Pete Mauzey, J. G. Oldham, J. M. Callaham, R. I. Waugh, J. L. Mason, R. C. Roberts, Henry Widmer, H. T. Phelps, Thomas Williamson and J. G. Adams, who were duly sworn to try this cause and proceed to hear the evidence, the hour for adjournment having arrived before the completion of this cause, the jury are excused until 8:30 tomorrow morning, first being properly instructed by the Court not to talk among themselves nor allow others to talk to them about this cause.

Afterwards, to wit, on the 12th day of February, the following further proceedings were had in said cause, to wit:

Allega Williams,
Plaintiff,
vs.
Edward B. Pryor, Receiver of Wabash Railroad Company,
Defendant.

The jury having heard all the evidence, argument
4 of counsel and received their instructions from the Court as to the law in the case are shown their room, there to consider of their verdict, remain a reason-

able time and return into open court with the following verdict:

We, the jury, find for the plaintiff, and assess his damages at the sum of five thousand dollars ($5,000.00).

J. M. Callaham, Foreman.

It is therefore ordered and adjudged by the Court as by the jury found that plaintiff have judgment and recover of the defendant Edward B. Pryor and Edward F. Kearney as Receivers of the Wabash Railroad Company the sum of $5,000.00 damages with interest thereon from rendition of judgment until paid at the rate of 6 per cent per annum, together with all the costs of this suit and that execution issue therefor.

Afterwards, to wit, on the 12th day of February, the following further proceedings were had in said cause, to wit:

Allega Williams,
Plaintiff,
vs.
Edward B. Pryor, Receiver of Wabash Railroad Company,
Defendants.

Now, to wit, on this 12th day of February, 1916, comes the defendant and files affidavit for an appeal to Kansas City Court of Appeals, accompanied by the docket fee of $10.00 as in such cases made and provided, and said affidavit and application being found sufficient in form, it is ordered and adjudged by the

Court that an appeal be granted herein to the Kansas City Court of Appeals at Kansas City, Missouri.

Attorneys for Plaintiffs:
Roy W. Rucker, Keytesville, Missouri,
H. J. West, Brookfield, Missouri.

Attorneys for Defendant:
J. A. Collett, Salisbury, Missouri.

State of Missouri, } ss.
County of Chariton. }

I, W. G. Wright, Clerk of the Circuit Court within and for the County of Chariton and State aforesaid, hereby certify the above and foregoing to be a true and correct copy of judgment and order granting an appeal in the cause therein named as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of said court. Done at office in Salisbury, Missouri, this 20th day of June, A. D. 1916.

(Seal)

W. G. Wright,
Clerk Circuit Court.

Endorsement:
Filed June 21, 1916.
L. F. McCoy, Clerk.

That the said abstract of record filed in the Kansas City Court of Appeals, and transferred to and filed in the Supreme Court of the State of Missouri, is in the words and figures following, to wit:

6 In the Kansas City Court of Appeals.
October Term, 1916.

Allega Williams,
Respondent,
vs.
Edward B. Pryor *et al.*,
Appellants.
No. 12,169.

Appeal from the Chariton County Circuit Court,
at Salisbury, Missouri.

APPELLANTS' ABSTRACT OF RECORD.

Hon. Fred Lamb, Judge.

PLEADINGS.

This cause went to trial in the Circuit Court of Chariton County, Missouri, at Salisbury, on the 12th day of February, 1916, on the following pleadings:

7 ### PETITION.

(Caption omitted.)

Plaintiff, for his first amended petition herein, leave of Court having first been granted to file the same, states:

That the Wabash Railroad Company is now and was at all the dates and times herein mentioned a railroad company and corporation, duly organized and existing under the laws of this state, and that it is now and was at all said dates and times the owner of a certain line of railroad from Kansas City, Missouri, by and through Keytesville and Salisbury, Chariton County, Missouri, and Moberly, Missouri, to

Ottumwa, Iowa, and to various other points in other states, and that the defendants Edward B. Pryor and Edward F. Kearney are now and were at all said dates and times the duly appointed, qualified and acting receivers of the said Wabash Railroad Company, and as such Receivers in charge of said railroad and all the property and equipment thereof, and engaged in the operation thereof as a common carrier by railroad of commerce between the various states of the United States.

That on the ..... day of November, 1915, plaintiff was in the employ and service of the defendants as a laborer in the track department of said railroad, and was engaged with other servants and employes of the defendants in taking down an old bridge over and across a stream known as Village Creek, near Ottumwa, Iowa, on the said line of railroad, preparatory
8 to the building of a new bridge over said stream by the defendants. That while the plaintiff was working on said bridge on that date he was ordered and directed by the boss in charge of the work, who was then and there the servant and employe of the defendants and in authority over plaintiff, to draw a certain drift bolt from one of the bridge caps in said bridge. That said drift bolt was a large iron or steel bolt about twelve inches long securely fastened into said bridge cap, and that said bridge cap was a wooden cap or beam about twelve inches square and about thirty-six feet long used in the construction of said bridge. That for the purpose of drawing said bolt the plaintiff was provided by the defendants with a certain clawbar, being an iron or steel bar about four or five feet long with claws and a heel at one

end, to be used by taking hold of the bolt with the claws, using the heel as a fulcrum and pressing down on the other end of the bar. That after plaintiff had cut the wood from around the head of said bolt so as to insert the claws of the clawbar underneath the head of the bolt and had drawn the bolt as far as possible while using the head of the bolt to hold the bar, he took another hold on said bolt with the claws of said bar and undertook to further draw said bolt by pressing down on the other end of the bar, and that while plaintiff was so pressing down on said bar in his effort to draw said bolt, and while he was pressing down on said bar with considerable force, but only such force as was necessary in order to draw the bolt, the claws on said bar, being much battered
9 and worn, suddenly slipped on said bolt, whereby plaintiff was caused to fall from his position on said bridge cap to the ground below, a distance of several feet, to wit, a distance of twelve to sixteen feet, falling upon and striking with great force and violence certain timbers and piling there situate, whereby plaintiff was greatly and seriously hurt and bruised upon and about his whole body. That by reason of his said fall the plaintiff received a severe injury to his head and back and right knee; and that as a result thereof he has suffered a considerable depression in the back of his head; his right knee is crippled and stiff; he has been rendered sick, sore and nervous, and has suffered and will hereafter suffer much pain and anguish of body and mind; he has been and will hereafter be compelled to incur a large expenditure for medicines and medical attention; he has lost much time from his work and labor, and his health and strength are permanently impaired. That the plain-

tiff's said injuries are permanent, and he has been damaged thereby in the sum of fifteen thousand dollars.

That said clawbar was caused to slip on said bolt and the plaintiff was caused to fall and to be hurt and injured as aforesaid by reason of the claws on said bar having become battered and worn to such extent that they would not take a firm hold on the bolt that was being drawn, and that because of such battered and worn condition of said claws the said claw bar was rendered dangerous and not reasonably safe for the work in which the plaintiff was engaged at the time of his said injury. That the plaintiff, without any fault or negligence whatever on his part, was unaware of the battered and worn condition of said clawbar, and did not know that the same was unsafe for use in drawing said bolt.

That it was the duty of the defendants to use ordinary care to furnish the plaintiff reasonably safe tools and appliances with which to work, and it was their duty to make reasonable and timely inspection and repairs thereto, to the end that the tools and appliances furnished him with which to work might be reasonably safe and suitable for the work he was required to do; but that the defendants negligently and carelessly failed and neglected to exercise such care and negligently and carelessly failed and neglected to furnish plaintiff a reasonably safe clawbar with which to work, and negligently and carelessly furnished him a clawbar with which to draw said bolt that was old and battered and worn as aforesaid and unfit for the purpose for which it was provided and not reasonably safe for the work in which the

plaintiff was engaged at the time he was injured; that the defendants knew or by the exercise of ordinary care in the inspection of said clawbar should have known the defective, unfit and unsafe condition thereof as aforesaid, before the same was furnished to the plaintiff with which to draw said bolt, and in time to have repaired the same before it was furnished to him for that purpose, but that they negligently and carelessly failed and neglected to make reasonable, timely and necessary repair thereto; that if the defendant did not know of the defective, unfit and unsafe con-
11 dition of said clawbar as aforesaid in time to have repaired the same before it was furnished to the plaintiff with which to draw said bolt, then the defendants negligently and carelessly failed and neglected to make reasonable and timely inspection thereof, and such want of knowledge on their part was caused and brought about by reason of their said negligence and carelessness in failing and neglecting to make such reasonable and timely inspection. That at the time the plaintiff was ordered and directed by the defendants' said boss to draw said bolt from the said bridge cap as aforesaid the defendants and their said boss knew or by the exercise of ordinary care should have known that it was dangerous and not reasonably safe to undertake to draw said bolt with said clawbar in its said defective, unfit and unsafe condition, and knew or by the exercise of ordinary care, should have known, that said defective, unfit and unsafe condition of the said clawbar and the danger of undertaking to draw said bolt therewith was unknown to the plaintiff, and it was then and there the duty of the defendants to give plaintiff timely notice and warn-

ing of the said defective, unfit and unsafe condition of said clawbar and the danger thus occasioned attending the work in which he was about to engage, but that the defendants negligently and carelessly failed and neglected to give the plaintiff any such notice or warning. That by reason of such negligence and carelessness on the part of the defendants the plaintiff was caused to fall from his position on said
12 bridge cap to the ground and to be hurt and injured as aforesaid.

That the bridge on which plaintiff was working at the time he was injured as aforesaid was a bridge used by the defendants in their business as a carrier of interstate commerce, that the trains of the defendants carrying interstate commerce were run upon and over said bridge, that the plaintiff was employed by defendants and was then and there engaged in helping the defendants to carry on their business as a common carrier by railroad of commerce between the various states of the United States, and that his said injuries were occasioned and brought about by reason of the negligence and carelessness of the defendants while engaged in carrying on such business.

Wherefore, by reason of the premises, plaintiff prays judgment against defendants for his said damages in the sum of fifteen thousand dollars, with costs of suit.

Roy W. Rucker,
H. J. West,
Attorneys for Plaintiff.

To which petition defendants filed the following answer:

ANSWER.

(Caption omitted.)

Come now defendants and for their answer to plaintiff's first amended petition, deny each and every allegation therein contained.

13 Further answering said amended petition, defendants say that all the injuries, if any, complained of in plaintiff's petition, as having been suffered by him, were directly contributed and occasioned by his own carelessness and negligence.

Further answering said amended petition, defendants say that the alleged injuries complained of in plaintiff's petition, as having been suffered by him, on account of which this action is prosecuted, arose out of the risk of the employment in which plaintiff was engaged, and of which he had full notice and knowledge, and that plaintiff, by entering and continuing in said employment, with full notice and knowledge of the dangers incident thereto, voluntarily assumed all of said risks.

Having fully answered plaintiff's said amended petition, defendants ask to be discharged with their costs.

J. L. Minnis,
J. A. Collet,
Attorneys for Defendants

REPLY.

Defendants' reply was a general denial.

RECORD ENTRIES.

The case was tried at the February, 1916, Term of the Circuit Court of Chariton County, Missouri, at Salisbury, before Hon. Fred Lamb, Judge, and a jury, on the 12th day of February, 1916, resulting in a verdict in favor of respondent for the sum of five thousand dollars ($5,000.00).

14 Thereafter on the 12th day of February, 1916, and during the same February, 1916, Term of this court, appellants filed their motion for new trial, which said motion for new trial was on the same day by agreement of parties taken up, and was by the Court considered and overruled.

Thereafter on the same day, and during the same term of court, appellants filed their motion in arrest of judgment, which motion in arrest of judgment was on the same day by agreement of parties, taken up, and was by the Court considered and overruled.

Thereafter on the same day, and at the same term of court, appellants filed their application and affidavit for appeal from the judgment of the Court, to the Kansas City Court of Appeals, which application for appeal was by the Court on the same day heard and sustained, and appeal granted to the Kansas City Court of Appeals.

Thereafter on the same day and at the same term of court, the Court made an order allowing appellants until September 1st, 1916, in which to file their bill of exceptions.

Thereafter on the 2nd day of October, 1916, appellants filed their bill of exceptions in said cause, which is as follows:

15 **BILL OF EXCEPTIONS.**

Allega Williams,
Plaintiff,
vs.
Edward B. Pryor *et al.*,
Defendants.

Be It Remembered, That on the 11th day of February, 1916, it being the regular February Term, 1916, of the Circuit Court of Chariton County, Missouri, the above cause coming on for hearing in said court, before the Hon. Fred Lamb, Judge, and a jury of twelve men duly sworn to try the cause, the following evidence was offered and the following proceedings were had, to wit:

Appearances:

Roy W. Rucker and H. J. West,
Attorneys for plaintiff.
J. A. Collet,
Attorney for defendants.

Plaintiff, to sustain the issues on his part, offered evidence as follows:

ALLEGA WILLIAMS,

the plaintiff, being called as a witness on his own part, duly sworn and examined, testifies as follows, to wit:

Direct Examination, by Mr. West.

Q. Allega, where do you live? A. I live south of Salisbury here.

16 Q. How long have you lived there? A. Well, I have lived there for the last five years.

Q. Prior to that, where did you live? A. I lived in Arkansas seven years.

Q. How old are you? A. Twenty-one.

Q. Twenty-one? A. Yes, sir.

Q. Reared on a farm? A. Yes, sir.

Q. Have you lived on a farm all your life? A. Yes, sir.

Q. Have you ever had any experience railroading? A. Not until this time.

Q. When did you begin railroading? A. Some time in August, I think it was.

Q. What year? A. This last August, 1915.

Q. For what railroad did you work? A. Wabash Railroad.

Q. You say you began in August this last year? A. Yes, sir, I think it was.

Q. How long did you work? A. Until November.

Q. Where did you work? A. I commenced at Albia and Harvey and then went to Ottumwa, Iowa.

Q. What kind of work had you been engaged in up until the 4th day of November? A. Helping build steel bridges and taking down old ones.

Q. Where were you working on the 4th day of November? A. Ottumwa.

Q. About how far from Ottumwa? A. About a half mile.

Q. Over what creek? A. Village Creek.

17 Q. What line of railroad runs over that bridge, Allega? A. Wabash.

Q. What Wabash line is that running from Ottumwa to Moulton? A. It is the main track of the railroad running from Moulton to Ottumwa.

Q. It is the main line of railroad running from Moulton to Ottumwa that passes over that bridge? A. Yes, sir.

Q. What were you doing there on the 4th day of November; what was your general work? A. We were drawing the bolts and putting in new ones.

Q. Was that the bridge that the trains of the Wabash run over running between Moulton and Ottumwa? A. Yes, sir.

Q. How long had you been working there at that bridge? A. Three or four days.

Q. You say you were working there on the 4th day of November, 1915? A. Yes, sir.

Q. You may state to the jury if you were directed by the boss in charge of that work to do any particular work there that afternoon. A. I was.

Q. Who was the boss? A. Bill Rickard.

Q. Was he in authority over the men working on that bridge? A. Yes, sir.

Q. Was he in authority over you? A. Yes, sir.

Q. Were you directed to do whatever Mr. Rickard ordered you to do? A. Yes, sir.

Q. What particular piece of work did Mr. Rickard direct you to do that afternoon, if you remember?
18 A. Well, none particularly that afternoon; first one thing and another.

Q. Now, with reference to drawing a drift bolt; what did he tell you to do? A. He told me to draw it.

Q. What kind of a bolt was that? A. It was a drift bolt; I don't exactly know what size it was.

Q. Was it iron or steel; an iron or a steel bolt? A. Iron.

Q. How big was it? A. Five-eights or ¾ of an inch.

Q. And about how long? A. Fourteen or fifteen inches long.

Q. What was it in? A. A bridge cap.

Q. About what were the dimensions of that bridge cap? A. It was 12x12x16 feet long.

Q. You mean 12 inches by 12 inches and 16 feet long? A. Yes, sir.

Q. Well, Allega, how are those drift bolts drawn? A. By a claw bar.

Q. What is a claw bar? A. It is a long steel piece of iron with two claws on it.

Q. How long? A. You mean the claw bar itself?

Q. Yes, sir. A. It's about five or six feet.

Q. Long? A. Yes, sir.

Q. And at one end it has claws and a heel? A. Yes, sir.

Q. How is the bolt drawn? A. With the claw bar; drawn by pulling it out.

Q. How do you do the work; I don't mean on that
19 particular occasion, but how it is ordinarily done? A. It is down in the timber and we always took an ax and chopped it out and hit it with the mall and loosened it and pulled it out.

Q. You take hold of the bolt with the claw bar and you use the heel of the claw bar as a fulcrum? A. Yes, sir.

Q. How do you insert—how do you get the claw bar under the head of the bolt? A. By taking an ax and chopping it out.

Q. Then what, if anything, is ordinarily done with reference to loosening the bolt? A. We take a mall and hit it.

Q. What is the purpose of that? A. To jar it loose.

Q. So it won't pull hard? A. Yes, sir.

Q. Then what is done? A. Place the claw bar under there and pull down.

Q. Pull down by the head of the bolt? A. Yes, sir; if it is loose enough, if not we Arkansas it.

Q. Arkansas it; what do you mean by Arkansasing? A. Twisting the bar and pushing gradually down on it.

Q. You mean twisting the bar with your hands? A. Yes, sir.

Q. And by pressing down on the end opposite the claws? A. Yes, sir.

Q. Is that the usual and ordinary way of drawing those drift bolts? A. Yes, sir.

Q. You say Mr. Rickard, the boss, directed you to
20 draw a drift bolt there that afternoon out of one of the bridge caps? A. Yes, sir.

Q. What did you do when he gave you that direction? A. I went ahead and tried to draw it.

Q. What, if anything, did you use? A. A claw bar.

Q. About such a claw bar as you have described? A. Yes, sir.

Q. Where did you get it? A. Lying in the middle of the track about.

Q. To whom did that claw bar belong? A. To the Wabash.

Q. For your use? A. Yes, sir.

Q. How did it happen to be out there where you were at work? A. It was just where they had gotten through with it.

Q. Was that one of the tools that was provided by

the defendant for use there in that work? A. Yes, sir.

Q. Where did you find it when you went to get it? A. Lying in the middle of the track.

Q. Were there any other claw bars at that place? A. No, sir.

Q. Did you know of any other claw bar about that work? A. I did not.

Q. What did you do when you went and got that claw bar? A. I picked it up, and I noticed it was not the one I had been using.

Q. Had you ever used this claw bar before? A. Not that I know of.

Q. Did you notice anything the matter with it when you glanced at it—or what, if anything, did you ob-
21 serve about the condition of the claw bar when you glanced at it casually?

Counsel for defendants: I object to that.

Q. Well, state to the jury what sort of an examination, if any, you made of it. A. I glanced at it and thought it was alright.

Q. Then what did you do? A. I tried to pull the drift bolt.

Q. I wish you would describe to the jury just how you tried to pull that drift bolt? A. Well, I first took an ax and chopped the wood out from under the head and hit it with the mall and jarred it loose.

Q. What did you hit? A. The head of the bolt.

Q. Then what? A. I took the claw bar and slipped it under the head of the bolt and it came up very easy, and I took and Arkansased it, gradually pushed down on it, and when I went to put my power on it, gradually going down, it slipped.

Q. What slipped? A. The claw bar.

Q. What caused it to slip? A. Not being sharp.

Q. Now, Allega, when you undertook to Arkansas that bolt at that time, you may state to the jury whether or not you placed the claw bar up securely against the bolt? A. I did.

Q. What did you do with reference to twisting the claw bar, if anything? A. I don't understand.

22 Q. How did you handle the claw bar? A. With my hands.

Q. What, if anything, did you do with reference to trying to hold the claw bar—in what position did you try to hold it? A. By gripping it and holding it.

Q. You testified a while ago about Arkansasing a bolt; what did you mean by that? A. Simply twisting the bar.

Q. What did you do with reference to twisting the bar, if anything, when you undertook to lift that bolt out? A. I don't understand what you mean.

Q. I am trying to get at whether or not you twisted the claw bar as you ordinarily do? A. Yes, sir.

Q. Now, Allega, when the claw bar slipped, as you say it did, what happened? A. I fell to the ground.

Q. Now, Allega, had you ever used a claw bar in this same way before this? A. Yes, sir.

Q. Had it ever slipped with you? A. No, sir.

Q. I wish you would tell the jury about how much experience you have had in drawing drift bolts. A. I have had experience on the other bridges where we had been putting them up.

Q. I mean as to the number of times you had drawn drift bolts? A. I drawed them a good many times.

Q. Did you ever draw them any other way? A.

23 Where they are real tight you heel up under them.

Q. Where they were very tight? A. Yes, sir.

Q. Where they are not very tight what is the usual way? A. Arkansasing.

Q. Had the boss been around there when you were pulling them that way? A. Yes, sir.

Q. Had you seen men, other men about this bridge and other bridges where you had worked drawing drift bolts? A. Yes, sir.

Q. Now state to the jury if this was the same way that these other men had pursued that kind of work? A. Yes, sir.

Q. Was the boss around when they were doing their work? A. Yes, sir.

Q. Did you ever overhear the boss remonstrate and tell them that was not the right way to do it? A. No, sir.

Q. How far was this bridge cap up above the ground? A. Twelve or fourteen feet.

Q. How far did you fall? A. I fell about twelve feet.

Q. Did you fall on anything? A. I fell on a sawed-off piling.

Q. Did you receive any injuries? A. Yes, sir.

Q. State to the jury what they were. A. I had my knee hurt and a place knocked in my head and my back.

Q. Were you able to get up without assistance? A. I tried to get up and fell back down.

24 Q. Did anybody come to your assistance? A. The rest of the boys.

Q. What did they do with you? A. Picked me up and carried me out on the bank.

Q. Were you conscious? A. Not all the time.

Q. Were you bleeding any? A. Yes, sir.

Q. What was your condition? A. The blood was

running out of my mouth and nose and on the side of my face; I don't know where that came from.

Q. Were you hurt any place else at that time, aside from these injuries that you have described? A. Not that I know of.

Q. Where did this blood come from, coming from your mouth and nose? A. I don't know.

Q. That was some internal injury? A. Yes, sir.

Q. That did not come from your head or your knee or your back? A. No, sir.

Q. Where, if any place, were you taken from the bridge? A. They took me to Ottumwa.

Q. What did they do with you there? A. Took me to the hospital and I stayed there from Thursday to Saturday.

Q. Did you receive any treatment from the company surgeons? A. I think it was the City hospital; they gave me treatment there.

Q. Where did you go then? A. Moberly.

Q. Who took you there? A. The cook that was with the gang.

25 Q. Who sent the cook with you? A. The boss.

Q. What did you go to Moberly for? A. Went to the hospital.

Q. What hospital, the Wabash hospital or—— A. Yes, sir.

Q. Did you stay in that hospital for a while? A. Yes, sir.

Q. How long? A. About eight weeks.

Q. Did you have any treatment there? A. Yes, sir.

Q. From whom? A. The house surgeon.

Q. That was the Wabash hospital you say? A. Yes, sir.

Q. Was this surgeon Dr. Ferguson? A. Dr. Ferguson; yes, sir.

Q. You say you stayed there about eight weeks? A. Yes, sir.

Q. Then where did you go? A. Came home.

Q. To your home south of Salisbury? A. Yes, sir.

Q. What work have you done since that time? A. I have not done any.

Q. Why? A. I am not able.

Q. What, if anything, did Dr. Ferguson tell you? A. Not to do any work. He told me he would let me go home provided I would not exert myself any.

Q. Now, Allega, I wish you would state to the jury whether or not you suffered any as the result of these injuries? A. I did.

26 Q. To what extent? A. Well, it was very painful.

Q. Where did you suffer this pain? A. From my back and knee.

Q. Did your head pain you any? A. Yes, sir; I had the headache.

Q. I wish you would describe to this jury the injury to your back. A. Well——

Q. Describe it as well as you can. A. Whenever I stoop over it hurts me.

Q. Where is that injury? A. It is right here.

Q. Right about the small of the back? A. Yes, sir.

Q. About the center—a little to the right? A. Yes, sir.

Q. Now, does that injury still pain you any? A. Yes, sir.

Q. Whenever you stoop over? A. Yes, sir.

Q. Have you ever tried to carry any load? A. No, sir.

Q. You don't know how it would affect you if you undertook to carry anything? A. No, sir.

Q. Have you suffered any from this head injury? A. Well, I have dizzy spells; yes, sir.

Q. When do you have those dizzy spells? A. Whenever I stoop over, and when I am up all day and lay down at night I am dizzy for a while and then I get alright.

Q. Suppose you stoop over and remain that way for a while, can you straighten up immediately? A.
27 Not immediately, no, sir; but I straighten up by degrees.

Q. When you straighten up, does it, or does it not, cause these dizzy spells to come on? A. Yes, sir; it does.

Q. Where is that injury to your head? A. Right up here.

Q. Right there (indicating)? A. Yes, sir.

Q. Tell the jury whether or not there is a depression in your head? A. There is a place there.

Q. That is, there is a depression there? A. Yes, sir.

Q. Suppose you press down on that spot, how does it affect you? A. It makes me have the headache.

Q. Now, which knee is it that was injured? A. The right one.

Q. In what respect was it hurt, Allega? A. It was hit right there (indicating).

Q. Right on the knee cap? A. Just this side (indicating).

Q. To the inside of the knee cap? A. Yes, sir.

Q. How is your knee affected now? A. It feels like a cord across there.

Q. In what respect is the use and movement of the

knee affected, if at all? A. I can not bend it up any more than like that (indicating).

Q. Can you draw it back setting as you are? A. No, sir.

28 Q. Show the jury how you can draw it back. A. (Illustrates).

Q. Now, show the jury to what extent you can move your knee. Are you holding it to keep me from bending it back? A. No, sir.

Q. State to the jury whether or not you limp when you walk. A. I do some; yes, sir.

Q. Show the jury to what extent you limp; walk just as you ordinarily do. (Illustrates).

Mr. West: I believe that's all.

Cross-Examination, by Mr. Collet.

Q. You could limp more than that if you wanted to? A. I could, if I wanted to, I reckon.

Q. If you really try to you could? A. Yes, sir.

Q. Now, Allega, this work that you were doing up there that day was not anything unusual about the work you were engaged in? A. Yes, sir.

Q. You had been doing that every day you had been working for the road? A. I had been doing different things.

Q. The kind that you were doing then? A. Yes, sir.

Q. And other men that were working on the same job had been doing the same kind of work that you were engaged in when you were hurt? A. Yes, sir.

Q. And you had been engaged from about August until November? A. Yes, sir.

Q About three months? A. Yes, sir.

29 Q. Not engaged in it yourself, but had been working with other men? A. Yes, sir.

Q. So you knew how this work was ordinarily done by the men? A. I knew part of it; yes, sir.

Q. The kind of work that you were engaged in you knew how that was done? A. Yes, sir.

Q. Just took any common claw bar and got it under the head of the bolt; if it was hard you heeled up under it? A. No, sir.

Q. That was left to the judgment of the men who were working? A. Yes, sir.

Q. If you thought it advisable and more expedient to Arkansas the bolt out you tried it that way, that is, if it was loose enough; that's right, isn't it, if in your judgment that you could do it that way, you did it? A. Yes, sir.

Q. If in your judgment it was safe and more expedient to heel up under it, you did that? A. Yes, sir.

Q. You determined that for yourself? A. Yes, sir.

Q. Now, putting it against the head of the bolt, there was no chance for it to slip off, was there? A. No, sir.

Q. Allega, I will show you this claw bar and I will ask you to look at it and see if that is the claw bar you were using that day? A. That looks similar to the one; yes, sir.

Q. Is that something like the bolt you were drawing? A. That is something like it.

Q. In your judgment, it is the same kind of a bolt;
30 same size and the same kind of a head that the ordinary drift bolt has, that is used in bridge work? A. Yes, sir.

Q. Now, if you will, I will get you to show the jury how you were drawing that bolt that day when you got hurt. A. Right that way.

Q. When you first started you had a firm hold of the bolt? A. Yes, sir.

Q. And it could not slip off? A. No, sir.

Q. When you drawed down without blocking it up you thought then it was loose enough you could Arkansas it? A. Yes, sir.

Q. And you were Arkansasing it? A. Yes, sir.

Q. That is, you just turned the claw bar on the side like this and just inched it up? A. Yes, sir.

Q. That is the way you did, wasn't it? A. Yes, sir.

Q. That is what you mean by Arkansasing it? A. Yes, sir.

Q. And you never are supposed to do that when the bolt is pulling hard? A. No, sir.

Q. The only time it is expedient and practical to Arkansas a bolt is when it is a little bit too hard to pull it out with your hand? A. No, sir.

Q. You depend on the grip that you give by turning the claw bar to one side to hold tight on the bolt to pull as much as you wanted to pull? A. Yes, sir.

Q. And, of course, if it pulled very hard you know it will slip? A. Yes, sir.

31 Q. So you don't ordinarily try to pull very hard with a claw bar in that way? A. No, sir.

Q. If you are pulling hard you expect to block up and get against the head of the bolt? A. Yes, sir.

Q. And that is the safe way to pull it? A. Yes, sir.

Q. Especially if you are standing somewhere where you expect to lose your balance? A. Yes, sir.

Q. And these claw bars are used from day to day

and for weeks and weeks at that kind of rough work? A. Yes, sir.

Q. And, of course, they can not stay sharp? A. No, sir.

Q. When you get them against a piece of iron and pull over that way, every pull you make makes it a little more dull? A. Yes, sir.

Q. And they are not expected to stay sharp? A. I don't know about that.

Q. You just count on them being in reasonable condition so they would hold on the head? A. Yes, sir.

Q. And hold on for a reasonable pull, from a good grip to the side? A. Yes, sir.

Q. You did not understand they were expected to cut inside at a side of the bolt? A. They would when they were sharp.

Q. While it might be sharp enough to do it, but it would not do it very long after you had used it it would soon become so dull that it would not? A. Yes, sir.

32 Q. I will get you to look at this claw bar and tell the Court and jury whether you think that is in about the same condition as it was when you were using it that day? A. About the same.

Q. About the same? A. Yes, sir.

Q. Did not anybody tell you to get this particular claw bar? A. No, sir.

Q. There was another claw bar that you said you had been using, I believe, or did I misunderstand you? A. I had used others.

Q. You had been using another claw bar on another bridge? A. Yes, sir.

Q. Is this the first time you had occasion to use a claw bar on this particular bridge? A. Yes, sir.

Q. When you saw the claw bar and looked at it, it looked to be in reasonably good condition? A. I thought so; yes, sir.

Q. And you did not look any further? A. No, sir.

Q. You did not look to see whether you could find another or not; they were waiting to get that in there; you never looked, nor picked for the other claw bar? A. No, sir.

Q. When you looked at this one, it looked like it was in reasonably good condition? A. Yes, sir.

Q. You never made any inquiry about the other one? A. No, sir.

Q. You never made any objection to this? A. I thought it was alright.

33 Q. That is the reason why you didn't? A. Yes, sir.

Q. It looked to be in reasonably good condition? A. Yes, sir; it looked like it was in very good condition.

Q. It did not look like it was fresh sharpened? A. Yes, sir.

Q. Mr. Rickard didn't tell you to use this claw bar? A. No, sir.

Q. He told you to go and pull that drift bolt? A. Yes, sir.

Q. And left you to get your own claw bar to pull it with? A. Yes, sir.

Q. Allega, you always noticed men doing work of this kind if they were standing in a place where they were liable to fall if the claw bar would slip they would block up under the heel so as to pull against the head of the bolt? A. Yes, sir.

Q. Or for any work they anticipated a slip or fall, they would take that precaution? A. Yes, sir.

Q. As a matter of fact, in the position you were in, you recognized the fact that if this should slip with you, you would probably fall off? A. I did not know.

Q. You realized if it should slip with you you would fall? A. Yes, sir.

Q. If you had thought about it you would have known that? A. Yes, sir.

Q. You were standing on a bent twelve inches wide; that is all the footing you had? A. Yes, sir.

34 Q. And you were standing on this bent at right angles from the bridge? A. Yes, sir.

Q. And pulling this pin out of the bridge cap? A. Yes, sir.

Q. And you reaalized, if you thought about it, that any slip would cause you to lose your balance and topple off? A. Yes, sir.

Q. And you knew that the safest way was to heel up under it and pull against the head? A. Yes, sir.

Q. If it was very hard to pull? A. Yes, sir.

Q. In that way you could be sure it would not slip? A. The block might slip out.

Q. But if the block is pulled in, there is no chance for the blocking to slip off? A. No, sir.

Q. You knew how to put it under? A. Yes, sir.

Q. And there was plenty of material to block up with? A. Yes, sir.

Q. And you were at liberty to get that and block up whenever your judgment directed you? A. Yes, sir; we had a right to.

Q. You were not criticized for doing that? A. No, sir.

Q. Nobody ever objected to you getting the blocks and taking the time to block it up? A. No, sir.

Redirect Examination, by Mr. West.

Q. Now, Allega, when you picked up this claw bar on that occasion, where did you take hold of it? A. Right about here, I reckon.

Q. Show me; just pick it up; pick it up and show me? A. Like that.

Q. You took hold about the center of the bar raised up which end? A. I raised up this end.

Q. That is the end opposite to the claws? A. Yes, sir.

Q. Did you take the claw end of the bar up and examine it closely? A. No, sir.

Q. Did you feel of it to see if it was sharp? A. No, sir.

Q. Just picked it up about as I am picking it up now? A. Yes, sir.

Q. That's about such an examination you made of it?

Counsel for Defendant: I object to that.

The Court: Don't lead the witness.

Q. Now, Allega, state to the jury whether or not you had seen other men working there on that bridge and other bridges drawing drift bolts from a position up above the ground like you were there. A. Yes, sir.

Q. When they were standing up several feet from the ground? A. Yes, sir.

Q. State to the jury whether or not they pursued the same course as you were pursuing there at that time. A. Yes, sir.

Q. Was the boss there? A. Yes, sir.

Q. Did he criticise them and tell them they were not doing it the right way? A. No, sir.

36 Q. State to the jury whether or not if the bar is properly sharpened it will slip on a bolt that does not draw hard or draws with about the same ease as the bolt that you were drawing there at that time. A. If it was properly sharpened it won't.

Q. Did the boss or any one else notify you that that claw bar was worn to such extent that it was likely to slip? A. No, sir.

Q. Did any one warn you to the effect that it was likely to slip on the bolt and cause you to fall? A. No, sir.

Recross-Examination, by Mr. Collet.

Q. You told Mr. West it would not slip if it was properly sharpened with the application of the amount of force you were using? A. Yes, sir; I mean if the bolt was not too tight in the wood and the bar was properly sharpened.

Q. You mean it would not slip if you grip tight enough—even if it were sharp, if you fail to pull over on the side like this (indicating) it would slip? A. No; it never slipped with me.

Q. So it being ever so sharp it would not hold by contact? A. It would not hold if you did not have anything to grip.

Q. And the condition of the bar then would make no difference, but whether this hold or not depends on two things, the amount of the grip, side grip, and the condition of the bar, the condition of the claw bar? A. I don't know about that.

Q. You don't mean to say—you would not say that this would hold if you would put it on to a bolt and

37 undertake to pull straight up, even if it were sharp? A. Not that I know of.

Q. You have to Arkansas it? A. Yes, sir.

Q. In other words, you have got to depend upon the side grip you get on it for your hold, that is the only hold you have got unless you block up? A. I guess so.

Q. So if you did not pull over very hard to the side, even if the bar were sharp, it would not hold; if you did not hold over good and solid it would not hold even if it were ever so sharp? A. I don't know about that.

Q. Suppose you were not holding very tight? A. I don't know; I never did try it.

Q. You know, as a matter of fact, you would slip; it would slip if you did not hold over to the side; it would slip, wouldn't it? A. I don't know.

Q. Do you mean to say, from your experience, that when you leave the head of the bolt, you are bound to have a side grip like that (indicating) in order to pull it? A. Yes, sir.

Q. It won't pull it without that after you leave the head of the bolt, not unless you block up under it? A. No, sir.

Redirect Examination, by Mr. West.

Allega, when the claw bar is properly sharpened and used in the manner you have described in Arkansasing a drift bolt out of a large timber, you may state to the jury whether or not it leaves a mark on the bolt. A. Yes, sir; it does.

38 Q. What kind of a mark? A. Kind of a little notch.

Mr. West: That's all.

(Witness excused.)

DOCTOR BRUMMALL,

being duly sworn, on behalf of plaintiff, testified as follows:

Direct Examination, by Mr. Rucker.

Q. Doctor, how long have you been practicing medicine? A. Twenty-three years.

Q. Doctor, have you recently examined the plaintiff in this case? A. I have.

Q. I wish you would tell the jury just what his condition was; taking up the injuries, first tell the jury what, if any, trouble you found with his head. A. There is a place in the back of the top of his head about the size of a quarter of a dollar; there is a depression there that would look to me as if there had been a fracture.

Q. Now, if the history of the case show that this plaintiff now suffers with dizziness when he is stooping over and with severe headache if there is any pressure on that part of the head, and if, at the time the injury was received, he bled from the nose and was for a time unconscious; state to the jury what may result from that injury? A. There was a pressure there on the brain; you may have a thickening there which would cause an epileptic condition and an inflammatory cerebritis.

39 Q. What is that? A. Inflammation of the brain.

Q. What is the effect of it? A. That would destroy the nervous system.

Q. Now, then, doctor, say to the jury whether it is possible to tell definitely what the result of that injury may be? A. I don't think so.

Q. Will there be any time in his life that it is possible to say that he will have any trouble?

Counsel for Defendant: I object to that.

The Court: Objection will be sustained. To which ruling of the Court the plaintiff then and there excepted.

Q. Would it be possible at any time in the future to say with definiteness to say whether there will be a complete cure?

Counsel for Defendant: I object to that.

Q. I'll put it this way. What will the probable result of the injury be to the patient? A. Well, as I stated before, I can not say; there is no way of saying positively what the result will be there. A pressure there may produce, or cause epilepsy, or it may produce cerebritis—a loss of the mind.

Q. Are there any ways known to profession to say definitely what the result would be? A. I don't think so.

Q. Suppose it would bring on epilepsy; what would the character of the epilepsy be; what effect? A. Well, he would have epilepsy. Of course, that would be permanent unless the bone was removed.

40 Q. You mean by that it would bring on epileptic fits? A. Yes, sir.

Q. Doctor, in your judgment, could that be completely cured by any kind of an operation? A. That is problematic, too; you can't tell.

Q. Going to the injury to the back; tell the jury what you found. A. There is a bruising at the pelvis and hip bone; there is a bruising and a thickening of the ligaments—attachments of the soft places of the back; also a stiffness of the back on that side.

Q. What will be the effect of that condition that you found there with reference to the plaintiff being able to perform heavy work? A. Well, that is problematic also.

Q. Now this is only about three months since the injury was done; that thickening could clear up until he could do reasonable work? A. Oh, yes.

Q. Is he in shape to do it now? A. I think not; no, sir.

Q. What, in your judgment, will be the probable result of that injury with reference to his being able to do a full man's work? A. He could not possibly do it under from six to twelve months, then he might do reasonably good work.

Q. Now then, tell the jury what condition you found at the knee. A. I found that the knee had been bruised and the muscular attachments that control the motion of the knee had been inflamed and infected, and also the knee cap bruised and the synovil
41 membrane under the knee cap infected and a roughness there.

Q. Will the plaintiff ever have the use of that knee joint? A. No, sir.

Q. Did you make a complete examination of that knee? A. Yes, sir; I think about that angle (indicating) is all that he can bend it.

Q. Can he bend it perfectly straight the other way? A. No, sir.

Q. Will that ever be completely cured? A. That may improve some.

Q. Can you say for certain that it will improve? A. I think it will, some.

Q. What might be the probable result of that injury to his knee with reference to some other trouble

that has not developed? A. Of course, there is a possibility of that becoming infected in a way; the bone might become infected or cartilage might become decayed.

Q. What sort of a decay? A. Or it might be a tubercular condition develop.

Q. Is that a probable and likely result of an injury of that kind? A. I would not say that it was.

Q. Is it an improbable condition? A. I think it adds to the chance of it happening; I could not say it was a probable result or an improbable result.

Q. What effect, if any, to the plaintiff; will he have to limp? A. He will have to limp; yes, sir; I think the knee will be stiff enough so he will have to; yes, sir.

42 Q. Tell the jury whether that knee will ever recover to the extent that he will be able to have the normal use of that leg. A. I would not think so.

Q. Tell the jury how long it will be before he will be able to do ordinary work. A. That would be problematic; I don't think under six months.

Cross-Examination, by Mr. Collet.

Q. Doctor Brummall, the only condition that you found about this young man that you can say with anything like reasonable certainty even in a modified form, is this injury to his knee. A. I think the injury to his back; that injury will cause him some trouble.

Q. You think the probabilities are he will have some trouble with his back? A. Yes, sir.

Q. I misunderstood you; I thought you said in your

judgment it would improve and it might entirely remove. A. I don't think so.

Q. Now, about his head; that was entirely a guess as to the future result? A. No, sir; I would not call it a guess.

Q. You said it was about how big a place? A. I didn't say.

Q. I will get you to put your hand on that place in my head, and see if it is about the same size; see if it is as large; if it is as big a place. A. His place is larger.

Q. You think I am in danger of having epileptic fits? A. You might.

43 Q. I would like to know a little more about it; suppose it has been there since I was seven years old? A. Oh, yes.

Q. I still have some danger? A. Yes, sir.

It is admitted by counsel for plaintiff and defendants that at the date of the plaintiff's alleged injury and for several years prior to that time the defendants, Edward B. Pryor and Edward F. Kearney were and that they are now the duly appointed, qualified and acting Receivers of the Wabash Railroad Company, and as such Receivers in charge of the railroad described in the petition and all the property and equipment thereof, and engaged in the operation thereof as a common carrier by railroad of commerce between the various states of the United States.

It is further admitted that the bridge upon which the plaintiff was working at the time of the alleged injury was a bridge on the defendants' line of railroad and that it was used by the defendants in their business as common carriers by railroad of commerce between the various states of the United States.

It is admitted by counsel that the rule of law in the State of Iowa as to assumption of risk and contributory negligence is the same as the Federal Rule on those questions.

ALLEGA WILLIAMS,

recalled by plaintiff.

Mr. West (Q.): Allega, it has been admitted here
44 that Edward B. Pryor and Edward F. Kearney were the Receivers of the Wabash Railroad Company at the time of this alleged accident, and that they were operating this railroad at that time; you may state if you were in the employ at that time and working for them as Receivers of the Wabash Railroad. A. Yes, sir.

Recross-Examination, by Mr. Collet.

Q. Referring again to this claw bar, would you be kind enough to say that was the same claw bar you used? A. It looks similar to the one; yes, sir.

Q. Well, Allega, this claw bar looks like the one you used? A. It looks something similar to it.

Q. Do you see anything about its condition that don't look like the one you used? A. No, sir.

Q. You can not point out anything? A. Well, the one I was using was, if I am not mistaken, it was bent up in the back.

Q. That would not make any difference about its holding? A. (No answer.)

Q. Did you ever look at the claw bar after you got hurt? A. No, sir.

Q. You have had no opportunity? A. No, sir.

Q. Never saw it any more? A. No, sir.

It is admitted that this is the same claw bar.

Q. Examine this claw bar carefully and state to the jury if it has—whether or not it has the appearance
45 of being battered and worn? A. Yes, sir.

Q. Point out to the jury where it is battered and worn? A. Right in here (indicating).

Q. Where you hold the bolt? A. Yes, sir.

Q. Looking at it from the position you would look at it, can you see that battered and worn place, or do you have to turn it over? A. Well——

Q. By looking at it from the position you are holding it? A. I don't believe you can tell anything about it.

Q. How can you tell, by turning it bottom side up, or if you take and examine it with your hands? A. Yes, sir; a person can tell it is battered then.

(Witness excused.)

Plaintiff rests.

Defendants introduce in evidence this claw bar and this drift pin as part of defendants' cross-examination.

ALLEGA WILLIAMS

recalled by defendants.

By Mr. Collet (Q.): Did you ever work with any other claw bar than the one you worked with up there? A. Yes, sir.

Q. Where? A. Over at Harvey, Iowa.

Q. Then you had had experience in this kind of
46 work before you went on the Wabash? A. Not before I went on the Wabash.

Q. Did you ever work with any claw bar except

the ones you worked with on the Wabash? A. No, sir.

Q. You were working with the same crew all the time? A. Yes, sir.

That's all.

(Witness excused.)

H. E. McNOWN,

being duly sworn, on behalf of defendants, testified as follows:

Direct Examination, by Mr. Collet.

Q. Where do you live, Mr. McNown? A. Brunswick.

Q. How long have you lived there? A. Twenty years.

Q. What is your business? A. Bridge work.

Q. Bridge builder? A. Yes, sir.

Q. You are working now in the Wabash service? A. Yes, sir.

Q. How long have you been working for the Wabash? A. Over two years.

Q. As a bridge builder? A. Yes, sir.

Q. Were you a member of the bridge building crew in which the plaintiff was working last fall? A. I was.

Q. Were you on the job—you worked on the same
47 jobs that you worked on during the course of his entire employment from August until November? A. Yes, sir.

Q. Were you working on the job he was working on during the time of the injury? A. Yes, sir.

Q. Mr. McNown, have you seen the claw bar that was exhibited before the jury? A. Yes, sir.

Q. State whether or not that that claw bar was the one which he was working with at the time of his injury. A. Yes, sir.

Q. How long, to your knowledge, had this claw bar been used by that crew? A. It has been on the job ever since I have—over two years.

Q. Mr. McNown, these claw bars—tell the jury whether they have any other service to perform than to pull spikes and bolts? A. They have none; no other purpose.

Q. I will get you to say whether or not, in the construction and preparation of those bars, if it is necessary to have them sharp? A. No, sir; none of them are sharp.

Q. Is there any purpose they serve or do serve that requires them to be sharp? A. No, sir.

Q. This claw bar was in use all that time. Now, I will get you to say whether or not that was, in your judgment, in good condition for the services for which it was being used?

Counsel for Plaintiff: We object to that, because it calls for a conclusion.

Counsel for Defendants: I will withdraw that question.

48 Q. In the course of your services as a bridge builder will ask you to say if this kind of a tool is used a great deal? A. Yes, sir.

Q. I will ask you to say whether or not the work of this raising and re-erecting bridges could be carried on without the use of claw bars? A. No, sir.

Q. Had you ever had any experience as a bridge

builder before you commenced working for the Wabash two years ago? A. No, sir.

Q. In the whole service with the Wabash you have constant use for a tool of this kind? A. Yes, sir.

Q. I will get you to say to the jury whether this claw bar was in good condition for the use to which it was being put?

Counsel for Plaintiff: We object to that for the reason that it calls for an opinion of the witness.

The Court: Objection sustained. To which ruling of the Court the defendants then and there excepted.

Q. I will get you to say, Mr. McNown, whether this claw bar was—have you seen it since it was brought here to this town? A. Yes, sir.

Q. I will get you to say whether it is substantially in the same condition it was that day of the accident, or is it duller? A. Duller—because it was used probably.

Q. About how much was the claw bar used since this accident?

Counsel for Plaintiff: We object to that for the
49 reason it is solely to have an effect on the jury, to get it before the jury.

The Court: I think it is competent. It will be overruled. To which ruling of the Court the plaintiff then and there excepted.

Q. To what extent and how much has it been used? A. It has been used ever since it was on the job off and on, but not continually.

Q. Up until what time? A. Until Wednesday.

Q. Last Wednesday? A. Yes, sir.

Q. Mr. McNown, I will get you to tell the jury if you know whether or not the plaintiff himself used

this claw bar frequently prior to the accident? A. Yes, sir.

Cross-Examination, by Mr. West.

Q. Mr. McNown, you say you have been in the employ of the Wabash Railroad Company for two years? A. Yes, sir.

Q. In the bridge department of the railroad? A. Yes, sir.

Q. You mean to say you have been in the employ of the Receivers? A. Yes, sir.

Q. And you are still in their employ? A. Yes, sir.

Q. What are you doing now? A. Still bridging.

Q. Still working in the bridge department? A. Yes, sir.

Q. Now, Mr. McNown, you say this claw bar has been in use ever since you commenced to work for
50 the Wabash Company some two years ago? A. Yes, sir.

Q. How many times has it been sharpened since that time? A. We never sharpen them.

Q. You never do? A. Nobody does.

Q. What do they do with the claw bars when they become worn? A. Send them and get new ones.

Q. Who determines when they get so old? A. The foreman will, he does that.

Q. Now how does he know whether they are in such condition that they ought to be turned in and cast aside? A. How does he know?

Q. Yes, sir. A. That all depends.

Q. He knows that from an examination he makes of them? A. Yes, sir.

Q. From an examination of them, is that true? A. Yes, sir.

Q. Does he ever inspect these claw bars to see if they are in such condition that they ought to be cast aside? A. I don't know.

Q. You know that is his duty and he recommends to the company that the claw bars be cast aside? A. Yes, sir.

Q. This claw bar was in the same worn and battered condition at the time this plaintiff got hurt that it is now, was it not? A. No, sir; it might be a little worse now.

Q. How much worse now? A. I don't know.

Q. In what respect is its condition different from
51 what it was then? A. I could not tell you, because I never examined it.

Q. You don't know that it is in any worse condition now than it was then? A. I say it may be worse, a little more battered.

Q. What do you say? A. I think it is.

Q. What would cause it to be worn more now than it was then? A. Work.

Q. How long ago was it that this plaintiff got hurt?

A. Fourth day of November.

Q. Of last November? A. Yes, sir.

Q. About three months ago? A. Yes, sir.

Q. This bar has been used then in bridge work ever since you have been working for the company some two years? A. Yes, sir.

Q. You don't know what its condition was when you went to work? A. No, sir.

Q. Was it worn and battered when you went to work? A. No, sir.

Q. So that the worn and battered condition of the claw bar now as you see it is the result of its use since you went to work for the company some two years ago? A. Yes, sir.

Redirect Examination, by Mr. Collet.

Q. Mr. McNown, I believe you have already answered that you used this claw bar frequently? A. Yes, sir.

Q. And you saw it used? A. Yes, sir.

Q. Did you ever have any trouble with it in the use in which it was applied in the bridge work?

Counsel for Plaintiff: We object to that.

52 The Court: Objection sustained. To which ruling of the Court the defendants then and there excepted.

Q. Mr. McNown, I will get you to tell the jury what is the proper method of drawing a drift pin with a claw bar? A. I would say pulling from the head always.

Q. Why? A. Because you have a better chance and there is no chance for the bar to slip.

Q. In your experience and work, I will get you to say from your experience I will get you to state whether you can use a claw bar Arkansasing a bolt out as has been described without slipping? A. Not on a hard pull, no.

Q. When and under what circumstances is it practical and safe to Arkansas a bolt? A. When you start to pull a bolt by the hand and you cannot pull it with your hand, we usually use the bars to Arkansas with.

Recross-Examination, by Mr. West.

Q. Now, Mr. McNown, the usual and ordinary way to pull a bolt is to put the claw bar underneath the bolt as far as you can and use the head? A. Yes, sir.

Q. And if the bolt pulls unusually hard you place a timber or a piece of wood of some sort underneath the heel of the claw bar? A. Yes, sir.

Q. And if the bolt does not pull hard the usual and ordinary way of pulling it is to Arkansas it? A. Sometimes we do and sometimes we don't.

53 Q. That is the usual and ordinary way? A. No, sir.

Q. What is the usual way? Did you not tell Mr. Collet you only had to heel when the bolt pulled hard? A. Yes, sir.

Q. And if the bolt does not pull hard the usual and ordinary way is to Arkansas it out? A. No, sir.

Q. What is the usual and ordinary way when the bolt does not pull hard? A. I pull it both ways myself.

Q. You consider Arkansasing it out safe and that is the usual way? A. No, sir; I could not say the usual way.

Q. You do it that way right along? A. Yes, sir.

Q. And the other men in the employ of these receivers do it the same way? A. Yes, sir.

Q. And they only use the head of the bolt when the bolt pulls hard? A. Yes, sir.

Redirect Examination, by Mr. Collet.

Q. Mr. McNown, who determines what manner the bolt shall be pulled? A. Nobody.

Q. There is no direction given? A. No, sir.
Witness excused.

JAMES DAVENPORT,

being duly sworn on behalf of the defendants, testified as follows:

54 **Direct Examination**, by Mr. Collet.

Q. Where do you live, Mr. Davenport? A. Bucklin, Missouri.

Q. What is your business? A. Working on bridge work.

Q. How long have you been a bridge builder? A. I have been working for the Wabash something—since about the middle of July.

Q. Last July? A. Yes, sir.

Q. Had you ever worked at that kind of work before you went to working for the Wabash? A. Yes, sir.

Q. Where? A. Santa Fe.

Q. How long were you in that service for the Santa Fe? A. I worked four years in Chicago.

Q. In the bridge building department? A. Yes, sir.

Q. Were you working with this particular crew that plaintiff was working in last fall? A. Yes, sir.

Q. Were you working with that crew the whole time from August until November? A. Yes, sir.

Q. Working with him? A. Yes, sir.

Q. Have you seen this claw bar that has been exhibited to the jury? A. Yes, sir.

Q. I will get you to tell the jury whether that is

the claw bar he was using at the time he was hurt? A. Yes, sir.

Q. I will get you to say to the jury how long
55 that had been used by the crew? A. Ever since I have been on the gang.

Q. That particular bar has been among your tools? A. Yes, sir.

Q. I will get you to say whether it was in use generally? A. Yes, sir; when it was needed.

Q. In that kind of work state whether or not the claw bar is used almost every day and many times a day? A. Yes, sir.

Q. State whether you know this plaintiff had used this claw bar frequently prior to his injury? A. I don't know how often he had used it, but a man working in these gangs use all the tools, he used it when he comes on to a bólt he wants out of his way —he would pull it.

Q. How many claw bars are on the job? A. That one and a bar with a little shorter handle than that. This was the long handle one.

Q. Mr. Davenport, I will get you to say to the jury whether in the use to which claw bars are put and to which this claw bar was being put at the time of the injury, it was necessary that that should be sharp in order to make it safe for the work? A. I would not know anything about sharpening a claw bar; I never heard of it.

Q. You don't know how a sharp claw bar would work? A. No, sir.

Q. Is there any use to which they are put that would make it necessary to have them sharp? A. No, sir.

Q. Mr. Davenport, in drawing drift pins of the kind that has been referred to in evidence, what
56 is the proper and safe manner to draw them? A. Put your bar in under and draw it from the head as far as you can and then you block and block up, draw it with the head.

Q. If you think it is too hard to draw—— A. The men use their own judgment.

Q. I will get you to say from your experience whether you can Arkansas a bolt that pulls hard without the claw bar slipping? A. I think not.

Q. Then under what conditions is it proper and desirable to Arkansas a bolt? A. Well, if I understand Arkansasing you pull on the bolt, kinking the bar on one side. Like that (indicating).

Q. Under what conditions is it proper and desirable to draw it in that method? A. It would have to be a loose bolt, one that you could not pick out with your hands, but work it out by inch.

Q. Mr. Davenport, you have had experience in that kind of work? A. Yes, sir.

Q. I will get you to show the jury how you Arkansas a bolt and about how much of a hold you would take? A. (Witness illustrates.)

Q. Is there anything except—what do you depend upon to pull the bolt when you Arkansas? A. You depend upon the claw bar catching in the bolt.

Q. Or do you depend upon the grip? A. I depend upon the grip, too, of course.

Cross-Examination, by Mr. West.

Q. Mr. Davenport, you say you went to work for the company last July? A. Yes, sir.

57 Q. As a bridge carpenter? A. Yes, sir.

Q. What was your particular duty, what were your duties? A. General work.

Q. The same kind of work that Williams was doing? A. Yes, sir.

Q. Was it your duty to draw this draw bolt, or these draw bolts? A. Sometimes.

Q. How many drift bolts have you drawn, have you any idea about that? A. No, sir; I would not know how often I pull them, but I pulled twelve or fifteen last Tuesday.

Q. You use these claw bars in that sort of work? A. Yes, sir.

Q. Was this claw bar among the tools when you went there? A. Yes, sir.

Q. How many other claw bars were being used? A. One.

Q. Do you know whether it was when Williams was directed by the foreman to pull that drift pin? A. I know it was about the tools, it was not lost.

Q. Do you know where he was when he fell? A. I was not out there at the bridge.

Q. Do you know where he was working? A. I knew what bridge he was working on.

Q. Do you know what timber he was working on? A. No, sir.

Q. If he was drawing a drift bolt from the bridge cap he would have to stand on the bridge cap, and if he fell there was nothing between him and the piling to catch him? A. No, sir.

58 Q. Have you noticed this claw bar since you came here? A. No, sir.

Q. Have you examined it? A. No, not to any extent.

Q. Did you notice that the claw bar was worn, that the claws on this bar are worn and battered? A. No, sir.

Q. You notice that now? A. I notice it is worn a little, but not bad.

Q. Do you see it is battered? A. Yes, sir.

Q. Did you observe that before you came here? A. No, sir; I never paid any attention to it.

Q. Now, Mr. Davenport, do you mean to tell the jury that if you catch that bar on a bolt to Arkansas it out and twist the bar so as to get a grip, a tight grip on the bolt, it will hold in the condition that it is in now? A. I don't know.

Q. I am asking you whether or not it would take a firmer hold if these claws were sharp than it would in the condition it is in now? A. That bar holds, it did the other day.

Q. Did you press on it very hard? A. I did not throw myself off the bridge.

Q. You did press down very hard? A. Yes, sir; pressed down.

Q. What was it you were drawing, a drift bolt? A. Yes, sir.

Q. You had hold of it by the head—you were not pulling on it hard or pushing down on it hard? A. When?

Q. The other day. A. Yes, sir.

59 Q. You did not have hold of it by the head? A. Yes, sir.

Q. Did you push down hard so as to give it a test? A. No, sir.

Q. I am asking you whether or not you pushed down hard? A. Hard enough to pull by bolt.

Q. Was the bolt in so tight that you had to push down on the bar pretty hard? A. Yes, sir.

Q. How did it happen that you did not build up under the heel of the claw bar if the bolt was pulling hard? A. I thought I could use my own judgment.

Q. That is what the men do every day? A. Yes, sir.

Q. And even when the bolt pulls hard they grip it in this fashion (indicating) and try to Arkansas it out? A. Yes, sir.

Q. And sometimes they have to push down pretty hard? A. Yes, sir.

Q. You were pushing down on it hard then? A. Yes, sir.

Q. So hard that if it had slipped you would have fallen? A. I could fall; I have fell.

Q. When you were Arkansasing? A. No, sir.

Q. Did you ever have one of those—were you ever pressing down when the bar gave way with you? A. No, sir.

Q. Pressing down hard? A. Yes, sir.

Q. Trying to Arkansas a bolt out? A. Yes, sir.

60 Q. You press as hard as you want to? A. Yes, sir.

Q. And sometimes you pull the bolt out? A. Yes, sir.

Q. Now, Mr. Davenport, you have been in this sort of work for a good many years? A. Yes, sir.

Q. You have worked for the Wabash and the Santa Fe? A. Yes, sir.

Q. Did you ever see any old claw bars that were pretty badly worn? A. Yes, sir.

Q. What do they do with them? A. We generally use them until we break them.

Q. They don't cast them aside as Mr. McNown said? A. They can.

Q. When do they get new bars? A. Oh, sometimes.

Q. Do they ever cast them aside when they are worn and battered? A. No, sir.

Q. Mr. Davenport, does that claw bar appear ever to have been sharpened? A. No, sir.

Q. It has been in use two years and has never been sharpened? A. No, sir.

Q. Now, Mr. Davenport, if you would take a file and file it off until it was sharp, don't you think it would take a firmer hold? A. I would not advise that the bar be filed.

Q. I am not asking that? A. I think not.

Q. If it were sharp it would cut a little notch in the bolt and you don't think it would take a firmer hold? A. No, sir; I think not.

Q. Mr. Davenport, I guess that tool would have
61 to be heated in order to be sharpened? A. I could not say about that.

Redirect Examination, by Mr. Collet.

Q. Did you ever hear of one being sharpened? A. No, sir.

Q. Did you ever hear of them being sharpened, about whether they could be sharpened or not?

Counsel for Plaintiff: We object to that.

Q. Are they sharp when they are new? A. No, sir.

Recross-Examination, by Mr. West.

Q. Are they battered and worn like this when they are new? A. No, sir.

That's all.

(Witness excused.)

WILL RICKARD,

being duly sworn on behalf of defendants, testified as follows:

Direct Examination, by Mr. Collet.

Q. Where do you live, Mr. Rickard? A. Salisbury.

Q. How long have you lived here? A. About three months.

Q. Where did you live prior to that? A. Before this?

Q. Yes, sir. A. I was born in Springfield, Mis-
62 souri. I have been living in Montgomery City before this.

Q. What service are you engaged in? A. Bridge and building.

Q. Bridge builder? A. Yes, sir.

Q. Working for the Wabash? A. Yes, sir.

Q. How long have you been a bridge builder? A. About six years.

Q. How long have you been working for the Wabash? A. Six years.

Q. I believe you were foreman in the gang in which the plaintiff was working? A. Yes, sir.

Q. Were you there on the job at the time he was hurt? A. Yes, sir.

Q. Have you seen this claw bar that has been exhibited here? A. Yes, sir.

Q. Was that the claw bar he was working with at that time? A. Yes, sir.

Q. I will get you to say to the jury whether that claw bar has been in service during the whole time he had been working for you? A. Yes, sir.

Q. Tell the jury whether or not he had used that claw bar frequently? A. Yes, sir.

Q. I will get you to say to the jury whether or not other members of the crew had used it in his absence prior to this injury? A. Yes, sir.

Q. Mr. Rickard, did you direct this young man to do the work that he was doing? A. Yes, sir.

Q. Did you give him any direction what tools he should use? A. No, sir.

63 Q. Did you give him any direction about the manner he should do the work? A. No, sir.

Q. Who was that, that told the men the work that should be done? A. I told him to get the claw bar and pull the drift bolt.

Q. Who made the selection of the claw bar? A. He did.

Q. Did you give him any direction about how he should use it? A. No, sir.

Q. Who determines that matter, the foreman or the man who is using it? A. He uses his own judgment about that.

Q. Mr. Rickard, there has been a good deal said about claw bars being sharp or dull? A. Yes, sir.

Q. Is there any use to which claw bars are put that requires them to be sharp? A. No, sir.

Q. I will ask you this question, Mr. Rickard,

whether or not a claw bar will hold under a head of a bolt without slipping off—is it safe for the use to which it is intended?

Counsel for Plaintiff: We object to that.

The Court: Objection sustained. To which ruling of the Court the defendants then and there excepted.

Q. I believe you said you had been a bridge builder for six years? A. Yes, sir.

Q. I will ask you to say whether in that work it is necessary for you to use and do you use these claw bars in that kind of service constantly? A. Yes, sir.

64 By Mr. Collet: I renew the question as to his opinion about it.

Counsel for Plaintiff: We object.

The Court: Objection sustained. To which ruling of the Court the defendants then and there excepted.

Cross-Examination, by Mr. Rucker.

Q. Mr. Rickard, what do you understand the question to mean when he asked about a sharp claw bar, you mean sharp like the blade of a knife? A. No, sir.

Q. Whether they are sharp enough that they would take hold of a metal? A. No, sir.

Q. When a claw bar has never been used it is just about in the same condition that it is right there (indicating)? A. Yes, sir.

Q. In other words, it is square across? A. Yes, sir.

Q. It is made like this is here with the bottom part perfectly square? A. Yes, sir.

Q. You tell this jury that a tool of this kind when

the claws are perfectly square won't take hold of a bolt? A. No, sir.

Q. That is your observation and experience? A. No, sir.

Q. Now, Mr. Rickard, when a man has been directed to pull a drift bolt like the one offered in evidence he places the bar under the head as far as he can, is it not the usual, the ordinary method for him to Arkansas? A. No, sir.

Q. Did you not tell me, in the presence of Mr.
65 Phillips in Mr. Collet's office, that by pushing in firmly and continuing to pull that that was the usual way? A. No, sir.

Q. What did you tell me? A. You asked me if a good claw bar would slip and I told you.

Q. Yes, sir; you told me there, in the presence of Mr. Phillips, that it would not; did you make that statement to me at all? A. No, sir.

Q. Did you at any time, in Mr. Phillips' presence—— A. He was absent during the entire conversation that I had with you.

Q. Did you at any time tell me that a claw bar in good condition would slip on a bolt like the one described? A. No, sir.

Q. Did you say anything about slipping? A. No, sir.

Q. Did I not ask you this question in Mr. Collet's office, in the presence of Mr. Phillips, and did you not give me this answer: "Mr. Rickard, if a man had used his claw bar to pull his drift pin, using the head of the drift pin and pull as far as he can by the head, and if it is not in exceedingly tight he then pushes the claw bar firmly against the pin and twists

it around and pulls down, is that not the ordinary way"; and if you did not say, "yes, sir". Did you not say "yes, sir," to me? A. Yes, sir; I did; yes, sir.

Q. And what you said a minute ago, you did not mean that? A. No, sir.

Q. I am asking you what you told me? A. Yes, sir.

66 Q. And that was the usual method then? A. No, sir.

Q. Now, Mr. Rickard, you undertook to tell me the truth then? A. I did.

Q. Explain to this jury why you now say it is not the usual method? A. Well, simply because they are not supposed to be used that way.

Q. Why, if you told me yesterday that that was the usual method, why do you now tell before this jury and say it is not the usual method; have you any explanation to offer for that? A. No, sir.

Q. Now, Mr. Rickard, the other claw bar was just like this one? A. Yes, sir; made just like it, only shorter than that.

Q. Been in use the same length of time? A. I think so.

Q. About the only difference between the claw bars was one was shorter than the other? A. Yes, sir.

Q. You were boss? A. Yes, sir.

Q. And you are instructed by the company when the bars become dangerous to make a requisition for a new one? A. Yes, sir.

Q. And you are supposed to examine these bars and if they are bad discard them? A. Yes, sir.

Q. And you perform your duty? A. Yes, sir.

Q. And inspect these bars? A. Yes, sir.

Q. And you look them over and see if they are reasonably safe? A. Yes, sir.

67 Q. And this company requires you to do that? A. Yes, sir.

Q. It is left to you as agent of the company to say whether this bar is reasonably safe or not? A. Yes, sir.

Q. And this bar is in the same condition now as it was when this accident happened? A. Yes, sir; probably it has wore a little more.

Q. So little that you can not point it out to the jury, you can not point out to the jury any difference? A. No, sir.

Q. And you still say as the agent of the company, you still pass it, as agent of the company, as a good bar? A. Yes, sir.

Q. And you knew what the condition of the bar was then? A. Yes, sir.

Q. You had performed your duty? A. Yes, sir.

Q. And you knew this young man Williams and other men who worked in the employment of the receivers, while in the position that Williams was in, that he was in a highly dangerous position if there was any slip? A. No, sir.

Q. You did not know that? A. No, sir.

Q. You tell this jury as a practical railroad man and bridge builder that you did not realize when a man was in the position that Williams was in that when a claw bar slipped it was likely to hurt him? A. Yes, sir; if he would slip.

Q. Answer that, did you know as foreman of the crew and as agent in charge that when a man took the position which the plaintiff Williams took for

68 the purpose of pulling a drift pin, located as that drift pin, if the claw bar slipped he would likely be seriously injured? A. No, sir.

Q. Did you know he was likely to fall? A. Yes, sir; he was liable to fall if the claw bar slipped; yes, sir.

Q. You know in that particular position that Williams was in if he did fall, he was likely to be hurt? A. Yes, sir.

Q. And Mr. Williams was very seriously hurt that day? A. Yes, sir.

Counsel for Defendant: I object to that.

By Mr. Rucker: I will withdraw the question.

Redirect Examination, by Mr. Collet.

Q. Now, Mr. Rickard, he asked you whether you passed this as a safe tool. I will ask you whether in your opinion it was safe? A. Yes, sir.

Counsel for Plaintiff: We object to that because it calls for an opinion and calls for the province of the jury.

The Court: Objection sustained. To which ruling of the Court the defendants then and there excepted.

Q. Mr. Rickard, I will ask you to say to the jury whether in the talk that Mr. Rucker had with you yesterday, if he said one word to you about Arkansasing a bolt out of a timber?

Counsel for Plaintiff: We object to that.

Q. I will ask you to say to the jury whether Mr.
69 Rucker—— A. He asked me if a good claw bar would slip.

Q. In that connection, was anything said about Arkansasing it? A. No, sir.

Q. About using it in that method? A. No, sir.
(Witness excused.)

WILLIAM SAILOR,

being duly sworn on behalf of defendants, testified as follows:

Direct Examination, by Mr. Collet.

Q. Where do you live, Mr. Sailor? A. Montgomery, State of Missouri.

Q. What service are you engaged in? A. Bridge.

Q. For the Wabash? A. Yes, sir.

Q. How long have you been working as a bridge builder? A. About a year and two months.

Q. In the Wabash service? A. Yes, sir.

Q. Were you working in this crew to which Mr. Williams belonged? A. Yes, sir.

Q. With which he worked? A. Yes, sir.

Q. Were you working with him during the whole time he was in service from August until November? A. Excepting when he got hurt

Q. You worked in the same general service? A. Yes, sir.

Q. With him most of the time, were you? A. Yes, sir.

70 Q. Mr. Sailor, have you seen this claw bar that was brought down here off of that job? A. Yes, sir.

Q. That has been exhibited to the jury? A. Yes, sir.

Q. I believe you said you were not working with him at the time he got hurt? A. No, sir; I was not working with him.

Q. You don't know just what implement he was using at the time he was hurt? A. No, sir.

Q. I will get you to say to the jury whether he used this claw bar frequently prior to the time of his injury? A. I could not tell you; I did not see him using it.

Q. You mean at the time of his injury, I am not talking about that. Do you know whether or not he used this claw bar prior to his injury? A. Yes, sir.

Q. How frequently, I mean whether it was just rare occasions or frequently? A. He used it often.

Q. That's what I mean, whether he used it often or seldom? A. Often.

Cross-Examination, by Mr. West.

Q. Now, Mr. Sailor, you say you have used this claw bar? A. Yes, sir.

Q. Did you know it was battered and worn? A. It is worn some; yes, sir. I don't know about the battered part, they are all worn after they pull one drift pin.

71 Q. Keep wearing more and more? A. Yes, sir.

Q. And the older one of these claw bars is the more it is apt to be battered and worn? A. Yes, sir.

Q. Did you know that this claw bar was battered and worn at the time Williams got hurt? A. I didn't know how badly.

Q. Did you know it was practically as bad then as it is now? A. Yes, sir; just about the same.

Q. How long have you been working for the company? A. Four years off and on, but not steady.

Q. Was this claw bar in use when you came to work? A. Yes, sir.

Q. Was it in about the same condition then as it is now? A. About the same condition; it is worn a little more.

Q. Now, Mr. Sailor, you have been working a good long time? A. Yes, sir.

Q. I mean, Mr. Rickard has been working a good long time? A. Yes, sir.

Q. You have been working under him? A. Yes, sir.

Q. So this claw bar was considerably worn when you went to work for the company four years ago? A. Yes, sir; I have been working.

Q. When you commenced working at Harvey, Iowa, was that the first time you ever saw it was worn considerably when you went to work, or were you
72 talking about some other claw bar when you went to work for the company? A. No, sir.

Q. Did you see when you went to work last September what the condition of that claw bar was? A. Well, when I went to work on that job it was in about the same condition then as it is now. It's a little more worn, probably.

Q. If this claw bar has been in use six years, you would not say it is in very much different condition now from what it was at the time you went to work with it last September? A. It had been more badly worn in six years than since last September.

Q. So it has not been worn much since you went to work last September? A. It has been worn more the last six years than it has since last September.

Q. It has not been worn very much since you went to work last September? A. It's only worn a little bit more.

Q. And very little? A. Some, I would not say how much.

Q. When did you see Williams working with this claw bar; when did you? A. When did I see him?

Q. Yes, sir. A. In September some time in Harvey.

Q. That is the first time he was using this claw bar? A. No, sir.

Q. When did you first see him using this claw bar? A. On the Harvey Bridge.

73 Q. How did you know it was this claw bar? A. I saw him using it.

Q. How do you know it was not the short bar? A. No, sir; it was not.

Q. How do you happen to remember that he was using this particular claw bar on that day? A. It was long.

Q. Did you remember the length of the claw bar he was using? A. No, sir; not exactly.

Q. Do you think you could possibly be mistaken? A. It is not probable.

Q. He might have been using the other claw bar? A. No, sir.

Q. You could not possibly be mistaken? A. He was using this one.

Q. You are certain of that as you are of anything else you have testified about? A. Yes, sir.

Redirect Examination, by Mr. Collet.

Q. I will get you to say to the jury whether or not this claw bar—that if it was the claw bar that was used in the harder service on account of its length? A. Yes, sir; it is.

Q. About how much difference is there in the length of these two claw bars? A. I would judge 10 inches anyhow.

(Witness excused.)

J. H. CHARLEY,

being duly sworn on behalf of defendants, testified as follows:

74 **Direct Examination,** by Mr. Collet.

Q. Where do you live, Mr. Charley? A. Montgomery City, Missouri.

Q. Are you engaged in the bridge building business? A. Yes, sir.

Q. For the Wabash Railroad Company? A. Yes, sir.

Q. How long have you been in that service? A. Since July.

Q. Had you ever had any experience before that? A. No, sir.

Q. Were you working in this same crew that the plaintiff was working in last fall? A. Yes, sir; I went there some time in September.

Q. Went on this particular work? A. Yes, sir.

Q. Was the plaintiff there then? A. Yes, sir.

Q. Did you work there with him thereafter until his injury? A. Yes, sir.

Q. Where was the whole crew? A. Ottumwa, Iowa, four miles south.

Q. It was in the State of Iowa? A. Yes, sir.

Q. Mr. Charles, had you used this claw bar frequently prior to this accident? A. Yes, sir.

Q. I will also ask you to say to the jury—did you

know whether plaintiff had used it frequently prior to this accident? A. Yes, sir.

Q. Give an idea about how often this bar was used, tell the jury about how constantly and how
75 frequently it came into service? A. Every day.

(Witness excused.)

DR. BRUMMALL,

Recalled by Defendants.

By Mr. Collet (Q.): Dr. Brummall, I was so alarmed yesterday when the suggestion was made that I might fall in an epileptic fit that I forgot to ask you some question. Did you ever have this young man under observation as a patient? A. Yes, sir.

Q. How many times did you see him? A. Once.

Q. You were just called in once to qualify as an expert, an expert witness? A. Yes, sir.

Q. And that is the only observation you have made of him? A. Yes, sir.

Q. Doctor, he is a young man about 21 years old? A. I believe so; yes, sir.

Q. I will ask you to say to the jury, whether it is less probable that the injurious results that you said might come to him from the injuries he sustained in a man his age, than would come if he was older? A. He is more apt to make a recovery at his age than he would be if older.

Q. Some of the baneful effects that probably might come to him are less likely to come to a man of his age? A. Yes, sir.

76 **Cross-Examination,** by Mr. Rucker.

Q. Did you make a careful examination of him? A. I did.

Q. And the evidence you gave the jury was based on that careful examination that you made of him? A. Yes, sir.

(Witness excused.)

Defendants rest.

This was all the testimony offered in this case.

At the conclusion of plaintiff's evidence, defendants offered the following instruction:

"Allega Williams
vs.
Edward B. Pryor *et al.*

The Court instructs the jury that under the law and the evidence adduced by plaintiff, your verdict and finding must be for defendants, and may be in the following form:

Allega Williams,
Plaintiff,
vs.
Edward B. Pryor *et al.*,
Defendants.

We, the jury, find the issues herein joined in favor of defendants.

.....
Foreman."

which instruction was by the Court refused, to which action of the Court in refusing said instruction defendants then and there objected and excepted.

At the conclusion of all the evidence in the case,
77 plaintiff asked and the Court gave Plaintiff's Instructions numbered 1, 2, 3, 4 and 5, which are as follows:

1.

"The Court instructs the jury that it is the duty of the master to use ordinary care to furnish his servant tools and appliances that are reasonably safe for the work he is required to do; and if you find and believe from the evidence in this case that the plaintiff was in the employ and service of the defendants, and that he was ordered and directed by the defendants' boss in authority over him to draw the drift bolt mentioned in evidence, and that such work was a dangerous work, requiring the use of a reasonably safe and suitable claw bar in order to make said work reasonably safe, and that the defendants, and their said boss, knowing that said work was dangerous, if it was dangerous, negligently and carelessly furnished him with a defective and unsafe claw bar with which to do said work, knowing that said claw bar was defective and unfit and not reasonably safe for such purpose by reason of being battered and worn to such extent that it would not take a firm hold on the bolt that he was ordered to draw (provided you find that it was so battered and worn and that it was thereby rendered defective and unfit and not reasonably safe for such work) and that the defendants in the exercise of ordinary care could have reasonably anticipated that an injury to one or more of their servants was likely to result from the use of such claw bar in its said alleged defective and unsafe

78 condition in such work as the plaintiff was engaged in at the time of the alleged accident, and if you further find that the plaintiff was injured, if he was injured by reason of such alleged negligence on the part of the defendants, then your verdict and finding should be for the plaintiff, unless you find for the defendants on the ground that the plaintiff assumed the risk.

2.

By the term ordinary care as used in these instructions is meant that degree of care usually and ordinarily exercised by careful and prudent persons under the same or similar circumstances; and the failure to use such care is negligence. By the term contributory negligence is meant negligence on the part of the plaintiff directly contributing to the alleged accident and injury.

3.

If you find for the plaintiff in this case, and do not believe from the evidence that the plaintiff was guilty of contributory negligence, then you should make your verdict for him in such sum as you believe from the evidence will fairly and reasonably compensate him for such injuries, if any, as you find and believe from the evidence he has sustained, not to exceed the sum of fifteen thousand dollars; but if you believe from the evidence that the plaintiff was guilty of contributory negligence, then such damages should be diminished by the jury in proportion to the amount of negligence attributable to him as compared

79 with all the negligence attributable to both the plaintiff and the defendants.

4

The jury are instructed that if your verdict be unanimous it is proper for your foreman only to sign it; but in case the jury should be unable to unanimously agree upon a verdict, and nine or more of your number less than twelve may agree upon and return a verdict, in which event all of your number so agreeing upon such verdict must sign it.

5.

If you find for the plaintiff in this case your verdict may be in the following form:

"Allega Williams,
Plaintiff,
vs.
Edward B. Pryor and Edward F. Kearney, Receivers of the Wabash Railroad Company,
Defendants.

We, the jury, find for the plaintiff and assess his damages at the sum of five thousand ($5,000) dollars.

.....
Foreman."

To the giving of which instructions, and each of them, defendants at the time objected, and defend-
80 ants' objections being overruled, saved their exceptions to the ruling of the Court.

Defendants offered, and the Court refused defend-

ants' instructions numbered 7, 11 and 12, which are as follows:

7.

The Court instructs the jury that a claw bar such as was used by plaintiff in this case, is what is known as a simple tool of which the master is not presumed to have greater or superior knowledge than the servant using such tool, and that no duty devolved on defendants to inspect such tool to ascertain its condition before permitting plaintiff to use the same, and you can not find defendants guilty of negligence for failure to make inspection of said claw bar to ascertain its condition prior to permitting its use by plaintiff in the labor in which he was engaged at the time of his alleged injury.

11.

The Court instructs the jury that under the law and all the evidence in the case, your verdict and finding must be for defendants, and may be in the following form:

Allega Williams, Plaintiff,

vs.

Edward B. Pryor *et al.*, Defendants.

We, the jury, find the issues herein joined in favor of defendants.

.....

Foreman.

12.

The Court instructs the jury that no duty de-
81 volved upon defendants to furnish plaintiff with the safest and best, or the newest claw bar that could be provided for his use in the work in which he was engaged, but defendants duty was entirely discharged if they provided him with a claw bar reasonably safe for the purpose for which it was intended to be used.

You are further instructed that "reasonably safe appliances and tools" as used in these instructions, means such appliances and tools as were commonly and ordinarily used in the business in which plaintiff was engaged.

To the action of the Court in refusing said instructions and each of them, defendants then and there excepted, and saved their exceptions to the ruling of the Court in so refusing said instructions.

Defendants offered instruction No. 3, which is as follows:

3.

If the jury shall find from the evidence that the usual, ordinary and safe way in which to perform the work in which plaintiff was engaged at the time of his alleged injury, was for the workmen to place a block under the heel of the claw bar with which he was working in order that the claw bar might catch against the head of the bolt, and, if you shall further find that it was not reasonably safe, the circumstances considered, for the workmen to depend upon the claw bar catching the side of the bolt, and hold-
82 ing by reason of its contact with the side of the bolt, and, if you shall further find from the evidence, that

plaintiff was attempting to draw said bolt by the latter and less safe method, and was thereby injured, then plaintiff was himself guilty of contributory negligence.

You are further instructed in this connection, that if you shall find that the manner in which plaintiff was performing the labor in which he was engaged at the time of his injury, was not a reasonably safe method, the circumstances under which he was working considered, and that plaintiff himself realized said fact at the time he was undertaking the performance of the labor in that manner, and voluntarily chose to perform the labor in that manner, rather than to use the safer method of blocking up under the claw bar so as to enable him to lift with the claw bar holding against the head of the bolt, then, and in that event, plaintiff assumed all the risks of injury incident to the manner in which he was performing said labor, and the defendants are not liable for the injury resulting therefrom.

The Court refused said instruction as offered and modified the same by adding thereto at the conclusion of said instruction, the following words: "And such fact will be considered by you in determining the amount of plaintiff's recovery, if any, under all the instructions," and the Court gave said instruction as amended, to which action of the Court in so amending said instruction No. 3 and in giving the
83 same to the jury as amended, defendants then and there excepted, and saved their exceptions.

Defendants asked, and the Court gave instructions numbered 1, 2, 4, 5, 6, 6½, 8, 9 and 10, which are as follows:

1.

The Court instructs the jury that if you shall find and believe from the evidence in the case, that the work in which plaintiff was engaged at the time of his alleged injury, and the claw bar with which it was necessary for him to work while so engaged, were both simple, and that the plaintiff knew of any danger to him, if danger there was, in the prosecution of such work with the claw bar used by him, then whatever danger there may have been to plaintiff in using said claw bar, as he did, was assumed by him and he can not recover.

2.

The Court instructs the jury that it was not the duty of defendants to furnish plaintiff with the newest, safest and most approved tools, and appliances with which to work, but that their only duty was to furnish reasonably safe tools and appliances. If, therefore, you shall find from the evidence that defendants did provide for plaintiff's use in the prosecution of the work in which he was engaged at the time of his alleged injury, reasonably safe and suit-
84 able tools, the character of the work in which he was engaged being considered, then there was no negligence committed by the defendants, and you must find for them.

4.

The Court instructs the jury that if the plaintiff undertook to perform the labor in which he was engaged at the time of his alleged injury with the claw

bar in question, without any directions from his foreman as to the tool which should be used by him in doing such work, and that plaintiff selected the claw bar in question with which to do said work, and that whatever defects, if any there were in said claw bar, were apparent to him, then and in that event, plaintiff can not recover, even though you may further find that the claw bar in question was not in a reasonably safe condition with which to perform the labor in which plaintiff was engaged.

5.

The Court instructs the jury that it was the duty of plaintiff in the discharge of the service in which he was engaged at the time of his alleged injury, to exercise reasonable care and diligence for his own safety. That is, to use such care and diligence as a reasonably prudent and careful person would have used under like or similar circumstances, and if you shall find that plaintiff failed to exercise that degree of care, and that his failure to do so was the sole
85 cause of his injury, then there can be no recovery in this case, and your finding must be for defendants.

6.

The Court instructs the jury that if you shall find that plaintiff was injured by reason of the claw bar with which he was working slipping on a bolt or drift pin, and causing him to fall, and if you shall further find that said claw bar slipped because of the manner in which it was being used by plaintiff, or because said claw bar was dull, or for both of the aforesaid reasons, and not because of any latent or hidden de-

fect, in said claw bar, and if you further find that the condition of the claw bar was apparent to plaintiff at the time, then there can be no recovery, and your verdict must be for defendants.

6½.

The Court instructs the jury that you can not presume negligence against defendants, and the mere fact that the plaintiff was injured while in the employment of defendants, and in connection with work which defendants were having performed, is no evidence whatever of negligence on the part of defendants, or any of their agents or servants.

8.

The Court instructs the jury that plaintiff in entering into the employment of the defendants, assumed
86 the danger of all the risks ordinarily incident to such employment, and if you shall find from the evidence that the injury which resulted to him, resulted from the danger which was ordinarily incident to the employment in which he was engaged, then there can be no recovery in this case, and your verdict must be for defendants.

9.

The Court instructs the jury that defendants were not insurers of the safety of their employes, and the mere fact that plaintiff was injured while engaged in defendants' service, does not entitle him to recover.

10.

The Court instructs the jury that if you shall find for the defendants, your verdict may be in the following form:

Allega Williams,
Plaintiff,
vs.
Edward B. Pryor *et al.*,
Defendants.

We, the jury, find the issues herein joined in favor of defendants.

.....
Foreman.

On the same day, to wit, February 12, 1916, the jury turned into open court, the following verdict:

"Allega Williams,
Plaintiff,
vs.
Edward B. Pryor and Edward F. Kearney, Receivers of the Wabash Railroad Company,
Defendants.

We, the jury, find for the plaintiff and assess his damages at the sum of five thousand ($5,000) dollars.

J. M. Callaham,
Foreman."

Within four days after the return of said verdict, to wit, on the said 12th day of February, 1916, and

during the regular 1916 February term of this court, defendants filed their motion for new trial, which appears by the record entries made at that time, which motion for new trial is in words and figures as follows:

"In the Circuit Court of Chariton County, Missouri, at Salisbury, February Term, 1916.

Allega Williams, Plaintiff,
vs.
Edward B. Pryor *et al.*, Defendants.

MOTION FOR NEW TRIAL.

Come now defendants in the above entitled cause and move the Court to set aside the verdict of the jury rendered in this cause, and to grant defendant a new trial herein, for the following reasons:

First. Because the Court erred in giving plaintiff's
88 instructions, numbered 1, 2, 3, 4 and 5, and each of them.

Second. Because the Court erred in refusing defendants' instructions numbered 7, 11 and 12, and in refusing defendants' instruction number 3, as asked, and in modifying said instruction number 3 by adding to the same at the conclusion thereof, the following words: "And such fact will be considered by you in determining the amount of plaintiff's recovery, if any, under all the instructions."

Third. Because the Court erred in admitting irrelevant, immaterial and improper evidence in behalf of

plaintiff, over the objection and exceptions of defendants.

Fourth. Because the Court erred in excluding relevant, competent and material evidence offered in behalf of defendants.

Fifth. Because the Court erred in refusing defendants' instruction in the nature of a demurrer, offered at the close of plaintiff's evidence.

Sixth. Because the Court erred in refusing defendants' instruction in the nature of a demurrer, offered at the close of the whole case, which is number 11 of defendants' refused instructions.

Seventh. Because the verdict of the jury is against the evidence and the weight of the evidence.

Eighth. Because the verdict of the jury is against the law and the evidence.

Ninth. Because the verdict of the jury is for the wrong party.

89 Tenth. Because the verdict of the jury is excessive.

Respectfully submitted,

J. L. Minnis,

J. A. Collet,

Attorneys for Defendants."

Thereafter on the said 12th day of February, 1916, and within four days of the rendition of the judgment herein, and during the same term of court, defendants' motion for new trial was by agreement taken up, and by the Court heard and overruled, to which action of the Court in overruling defendants' motion for new trial, defendants then and there excepted at the time, and saved their exceptions.

Thereafter on the said 12th day of February, 1916,

and within four days from the return of the verdict of the jury, and at the same term of court, defendants filed their motion in arrest of judgment, which is as follows:

"In the Circuit Court of Chariton County, Missouri, at Salisbury, February Term, 1916.

Allega Williams, Plaintiff,
vs.
Edward B. Pryor *et al.*, Defendants.

Come now defendants and move the Court to arrest the judgment rendered herein for the following reasons:

First. Because the Court erred in overruling defendants' motion for new trial.

90 Second. Because the Court erred in entering judgment for plaintiff upon the pleadings and the evidence.

Third. Because the verdict of the jury is not responsive to the petition, and not supported by the evidence.

Respectfully submitted,
J. L. Minnis,
J. A. Collet,
Attorneys for Defendants."

Thereafter on the said 12th day of February, 1916, within four days of the rendition of the verdict herein, and during the same term of court, defendants' motion in arrest of judgment was by agreement of parties taken up, and was by the Court heard and overruled, to which action of the Court in over-

ruling defendants' motion in arrest of judgment, defendants then and there excepted at the time.

Thereafter on the said 12th day of February, 1916, and during the same term of court, defendants filed their affidavit and application for an appeal to the Kansas City Court of Appeals, which application was on said date by the Court granted, and thereupon, the Court at the same time gave leave to defendants to file their bill of exceptions on or before September 1st, 1916. All of which matters appear by the record entries of said Court made and entered at that time. And now come defendants and present this, their bill of exceptions, and pray that the same may be al-
91 lowed, signed, sealed and filed as a part of the record herein, which is accordingly done this 3rd day of October, 1916.

Fred Lamb,
Judge of the Circuit Court
of Chariton County, Missouri.

O. K.
Roy W. Rucker,
Attorney for Respondent.

94 That the opinion of the Kansas City Court of Appeals filed with the order transferring said cause to the Supreme Court of the State of Missouri is in the words and figures following, to wit:

95 In the Kansas City Court of Appeals.
October Term, 1916.

Allega Williams,
Respondent,
vs.
Edward B. Pryor, Receiver of the Wabash Railroad Company,
Appellant.
No. 12169.

Appeal from Chariton Circuit Court.

This is an action for damages for personal injuries plaintiff alleges he sustained in consequence of negligence of defendants, his employers, who, at the time, were receivers of the Wabash Railroad Company.

Plaintiff, a laborer, was employed in the work of tearing down a bridge on the road near Ottumwa, Iowa, and was attempting to draw a bolt from a bridge cap with a claw bar when the claws slipped from their hold on the bolt, causing plaintiff, who was bearing down on the free end, to lose his balance and fall to the ground, a distance of twelve feet. The petition alleges "that said claw bar was caused to slip on said bolt and the plaintiff was caused to be hurt and injured by reason of the claws on said bar having become battered and worn to such an extent that they would not take a firm hold on the bolt that was being drawn, and that because of such battered and worn condition of said claws, the said claw bar was rendered dangerous and not reasonably safe for the work in which plaintiff was engaged * * * and plaintiff, without any fault or negligence whatever on his part, was unaware of the

battered and worn condition of said claw bar, and did not know that the same was unsafe for use in drawing said bolt," and the specific negligence averred in that defendants' "negligently and carelessly failed and neglected to furnish plaintiff a reasonably safe claw bar with which to work, and negligently furnished him a claw bar with which to draw said bolt that was old and battered and worn as aforesaid and unfit for the purpose for which it was provided and not reasonably safe for the work in which the plaintiff was engaged at the time he was injured," etc.

The defenses interposed by the answer are a general denial and pleas of assumed risk and contributory
96 negligence. The jury returned a verdict for plaintiff for $5,000, and after their motions for a new trial and in arrest were overruled, defendants appealed.

The pertinent facts disclosed by the evidence of plaintiff may be stated as follows: Plaintiff, who was 21 years old, and had been reared on a farm, entered the service of defendants as a common laborer in August, 1915, and worked for them until his injury in November of that year, his work being that of "helping build steel bridges and taking down old ones." Shortly before his injury the foreman in charge of the work of tearing down an old bridge, ordered plaintiff to draw a certain drift bolt which was about fifteen inches long and three-quarters of an inch in diameter from the bridge cap, a timber sixteen feet long and twelve by twelve inches in its other dimensions. First, plaintiff cut the wood from around the bolt with an axe, then he struck the bolt sidewise with a maul to loosen it, and then he took up the claw

bar, which was one of the tools provided by defendants, and so, far as the evidence discloses, the only claw bar at hand, and proceeded to draw the bolt out of the cap. The claws projected forward from the heel of the claw bar which rested on the cap and served as the fulcrum. On the first application of the power exerted by plaintiff, who stood on the cap and pressed downward on the free end of the bar, the claws pressed upward on the head of the bolt, and pulled the bolt out of the wood to the limit of the action of the claws. Then plaintiff raised the free end of the lever, inching the claws down the shank of the bolt and then by twisting or turning the bar in his hands, endeavored to grasp the shank tightly between the claws so that the next application of power would be exerted at the place where the bolt was being held in that grip. The men called this inching process "Arkansawing the bolt," and the evidence of plaintiff tends to show that such was the customary, as well as the most expeditious method of pulling bolts, while the evidence of defendants is to the effect that the customary and safer method was to block up under the heel after each pulling of the bolt, so that the claws at each application of the power would press directly against the bolt head and
97 be held thereby from slipping. Plaintiff states that in "Arkansawing the bolt" he endeavored by turning the bar to obtain a firm hold on the shank, but that the claws had become so rounded and dulled by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.

Further, plaintiff states that to discover the de-

fect required the inspection of the underside of the tool, and that in obeying the order of the foreman to draw the bolt, he did not pause to make such inspection, but proceeded to use the tool without any but a casual inspection of its top surface, which did not reveal the presence of the defect. The railroad on which plaintiff was working was engaged in interstate commerce, and the case was properly tried by both parties on the theory that the cause of action, if any, inured to plaintiff, fell within the purview of the Federal Employers' Liability Act. That act took possession of the field of employers' liability to employes in interstate transportation by rail, and superseded all State laws and judicial policies upon the subject (Second Employers' Liability Cases, 223 U. S., *l. c.* 55; Seaboard Air Line vs. Horton, 233 U. S., *l. c.* 501).

As is pointed out in the case last cited, the act has two branches, one of which relates to defects and insufficiencies "in the cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment," and the clear intention of Congress was to found an action in favor of the employe upon negligence only, and to exclude responsibility of the carrier to employes for defects and insufficiencies not attributable to negligence. The doctrine of comparative negligence is recognized and the defense of contributory negligence may be invoked by the defendant in diminution of the recoverable damages, but not to defeat a recovery entirely. In our consideration of the demurrer to the evidence, which defendants agree should have been sustained, we need not pause to discuss the issue of contributory negligence, which

held a prominent position throughout the trial, since, so far as that issue is concerned, plaintiff would have been entitled to go to the jury if his contributory negligence had been never so great and the negligence
98 of defendants never so slight. Given negligence of the carrier which directly cooperated with negligence of the employe to produce the injury, issues of fact are presented which must be referred for solution to the triers of fact, except in instances where the defect, which the carrier negligently suffered to continue, was of a character to fall within the risks assumed by the employe.

In the jurisprudence of this state the humane rule has become firmly fixed that the servant, neither by express nor implied agreement, may assume the risk of defects which are caused by the negligence of the master, but the Federal rule which we must apply in this case is different. Under that rule, knowledge of the servant of the defect and of the nature of the risk it creates will cast responsibility on him for the risk if he continue in the employment without objection, and where the defect and risk are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, the servant will be presumed to have observed and appreciated them and to have assumed the danger they added to his service. (See Seaboard Air Line v. Horton, *supra* [*l. c.* 504], and cases cited).

This rule, so fair of face and hard of heart, loses sight of the necessities which often compel the wage-earner to accept employment on the employer's terms, and encourages employers to be indifferent to the safety and welfare of their employes. Where the employer negligently allows the place or instru-

mentalities of work to become defective and not reasonably safe, knowledge of such condition and its dangers should not affect the right of the servant to a reasonably safe place of work and reasonably safe tools with which to work.

But we must apply the Federal rule, harsh as it is, and applying it we find plaintiff's injury was caused by a risk he assumed. The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to plaintiff. A servant is not held to the duty of making a critical or extensive inspection of places or tools, but is expected to be ordinarily attentive to his work and to make such discoveries as ordinary attention under the circumstances would have revealed.

99 The clawbar was battered and worn and a mere look at the claws would have disclosed the battered, rounded edges and would have proclaimed to the most common understanding that such edges could not be made to take firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it.

The judgment is reversed. All concur.

J. M. Johnson.

100 That the motion for a rehearing filed in the Kansas City Court of Appeals in said cause and transferred to and filed in the Supreme Court of the State of Missouri, pursuant to the said order of said Court of Appeals, is in the words and figures following, to wit:

In the Kansas City Court of Appeals.
October Term, 1916.

Allega Williams,
Respondent,
vs.
Edward B. Pryor *et al.*, Receivers of the Wabash Railroad Company,
Appellants.

MOTION FOR REHEARING.

Comes now respondent herein and moves this Court to grant him a rehearing in this cause because this Court, as shown by the opinion rendered herein on the 6th day of November, 1916, has overlooked authorities decisive of this cause, which were duly presented by respondent's counsel in their brief; because said decision is in conflict with the law as announced by the Courts of Appeal in the State of Missouri, and because said opinion is in direct conflict with the decisions of the Supreme Court of the State of Missouri, in the following respects, to wit:

First, respondent is denied the right to recover in this case on the theory that the Federal rule of assumption of risk must be followed by this Court.

After discussing the facts in the case this Court announces the rule as interpreted by the Missouri Courts and follows said discussion with an announcement of the Federal rule, concluding with the statement that the Federal rule must be followed. With no desire to show disrespect to this Court we must say that in view of this Court's declaration in the case of Cross v. Railroad, 191 Appeals, *l. c.* 212, the

statement that the Federal rule is to be followed by the Missouri courts is most astounding. In the Cross case Judge Trimble discussed at length the Federal doctrine and with the approval of the other members of this Court expressed the opinion that the Federal rule should be applied to cases arising under the Employer's Liability Act, but on page 210 of the opinion
101 in the Cross case attention is called to the fact that the Supreme Court of Missouri in the case of Fish v. Railroad, 263 Mo. 106, held

> "that the meaning and effect of the United States Supreme Court's decision in the Horton case, wherein it is said the matter was left 'open to the ordinary application of the common-law rule' meant the common law as interpreted and enforced in the respective states" * * *.

Further discussing the Fish case and the effect of the opinion of the Supreme Court of Missouri, this Court, through Judge Trimble, said:

> "The Court then goes on to show that the common law, as administered in Missouri with regard to assumption of risk, is that the servant does not assume the dangers or perils caused by the negligence of the master, and that when the injury is caused by a peril created by the negligence of the master, the only defense is that the peril was so great that no reasonable man could hope to escape by reasonable care; in which event the servant would be guilty of contributory negligence." * * * "Still the holding of the Court is plain that the Missouri rule as to assumption of risk will be applied, and we defer to that holding."

Again, on page 212, this Court says:

> "We defer, however, to the views of our State Supreme Court on the matter in question and are thus relieved of the necessity of deciding whether the Federal or the Missouri rule as to assumption of risk should be followed in a case under the Employer's Liability Act, or whether there is any room herein for the application of the Federal rule."

There has been no later discussion of the questions as to whether the state or Federal rule should be followed until that found in the instant case and, therefore, we again affirm that we read with no little surprise the announcement by this Court that the Federal rule must be followed. There can be no doubt that the Supreme Court, in the Fish case, *supra*, unequivalently declared that the Federal rule was not binding and in the Fish case the Supreme Court of Missouri announced a rule in conflict with the Federal rule.

Under the plain mandate of the constitution, this
102 Court must follow the last controlling opinion of the Supreme Court. This Court has recognized in the Cross case, *supra*, the meaning and effect of the Fish case, *supra*, and we earnestly and respectfully urge that the Court now reconsider the opinion in this case which is so obviously in conflict with its own prior holding as well as in conflict with the opinion of the Supreme Court.

The opinion in this case is in conflict with the opinion of the Springfield Court of Appeals in the case of Hawkins v. Railroad, 174 S. W., page 129.

The finding of this Court on what constitutes assumption of risk is in direct conflict with the rule of

the Supreme Court lately announced in the Fish case, *supra*, and authorities therein cited. The Supreme Court of Missouri has repeatedly announced that the servant's claim for damages on account of defective tools furnished by the master can not be defeated on the theory that he assumed the risk incident to the use of such defective tools because his implied contract does not include the risk of the master's negligence and that where the servant continues in the employ of the master and in the use of such defective tools, he is guilty, if at all, of "contributory negligence" and not of "assumption of risk". The distinction between "assumption of risk" and "contributory negligence" is comprehensively discussed in the Fish case, *supra*, *l. c.* 124, as follows:

> "On the other hand, 'assumption of risk' is confined to the relation of master and servant, and means what its terms denote, that when a hiring takes place, the parties mutually undertake, first, the master to pay a stipulated wage and to exercise ordinary care in providing a reasonably safe place and appliances for the work to be done; second, the servant to assume or take the risks of any mishaps which may befall him, after the observance of such care by the master, which are ordinary incidents of the work which he engaged to perform. It is apparent that these several obligations assumed by the respective parties, are reciprocal considerations, moving from the one to the other, and that they strictly rest upon contracts to that effect implied between them by sound legal policy. Necessarily, therefore, the assumption
103 of neither goes beyond its terms. Thus measured, the servant does not assume any dangers

or perils caused by the negligence of the master. In cases, therefore, where the servant is injured by the negligence of the master in furnishing an unsafe or defective tool, his suit for such injuries can not be defeated on any theory of assumption of such risk, for his implied contract did not include the risk of the master's negligence. It follows that when the servant is injured by a peril created by the negligence of his master, the only defense to a suit therefor is that the servant, with no reasonable grounds to believe he could escape such danger by ordinary care, negligently disregarded its imminence and thereby directly contributed to his own injury, or, in other words, that the servant was guilty of 'contributory negligence'. That is the common law as administered in Missouri (Charlton v. Railroad, 200 Mo., *l. c.* 433, and cases cited; George v. Railroad, 225 Mo., *l. c.* 407, and cases cited)."

For the reasons herein assigned we respectfully urge that respondent be granted a rehearing herein.

H. J. West,
Roy W. Rucker,
Attorneys for Respondent.

Indorsement: Filed Nov. 15, 1916.
L. F. McCoy, Clerk.

104 That the said order of the Kansas City Court of Appeals overruling said motion for a rehearing and transferring said cause to the Supreme Court of the State of Missouri, is in the words and figures following, to wit:

Kansas City Court of Appeals.
October Term, 1916.

Allega Williams,
Respondent,
vs.
Edward B. Pryor, Receiver of the Wabash Ry. Co.
Appellant.

Appeal from Chariton Circuit Court.

Now at this day the Court here having fully considered the respondent's motion for a rehearing, doth consider and adjudge that said motion be and the same is hereby overruled. It is further considered and adjudged by the Court that on account of one of the Judges deeming the decision to be in conflict with Fish v. Railway, 263 Mo. 106, 123, it is without jurisdiction, and therefore orders said cause certified to the Supreme Court for its determination.

105 And thereafter, on the 30th day of October, 1917, the following proceedings were had in said cause and entered of record in the Supreme Court of Missouri, to wit:

Allega Williams,
Respondent,
vs.
Edward B. Pryor *et al.*, Receivers,
Appellants.
No. 20077.

Come now the said parties, by their attorneys, and after arguments herein, submit this cause to the Court.

And thereafter, on the 1st day of December, 1917,

the following further proceedings in said cause were had and entered of record in said Supreme Court, to wit:

In the Supreme Court of Missouri,
October Term, 1917.

Allega Williams,
Respondent,
vs.
Edward B. Pryor and Edward F. Kearney, Receivers of the Wabash Railroad Company,
Appellants. (20077)

Appeal from the Circuit Court of Chariton County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Chariton County rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellants his costs and charges herein expended and have therefor execution. (Opinion filed.)

That on the same day, to wit, the 1st day of December, 1917, there was filed in said cause the opinion of the Supreme Court of the State of Missouri, in the words and figures following, to wit:

106 In the Supreme Court of Missouri,

Court *in Banc*, October Term, 1917.

Allega Williams,
Respondent,
vs.
Edward B. Pryor *et al.*,
Appellants.
} No. 20077.

This case reaches this court by a proper certification of the Kansas City Court of Appeals, it being recited in the certificate of that court that one of the Judges of that court deemed their opinion to be in conflict with the law as announced by this Court in the case of Fish v. Ry. Co., 263 Mo. 106.

Judge Johnson of the Court of Appeals fairly outlines the case in this language:

> "This is an action for damages for personal injuries plaintiff alleges he sustained in consequence of negligence of defendants, his employers, who, at the time, were receivers of the Wabash Railroad Company.
>
> "Plaintiff, a laborer, was employed in the work of tearing down a bridge on the road near Ottumwa, Iowa, and was attempting to draw a bolt from a bridge cap with a clawbar when the claws slipped from their hold on the bolt, causing plaintiff, who was bearing down on the free end, to lose his balance and fall to the ground, a distance of twelve feet. The petition alleges 'that said clawbar was caused to slip on said bolt and the plaintiff was caused to be hurt and injured by reason of the claws on said bar having become battered and worn to such an extent that they would not take a firm hold on the bolt that was being drawn and that because of such battered

and worn condition of said claws, the said clawbar was rendered dangerous and not reasonably safe for the work in which plaintiff was engaged, * * * and plaintiff, without any fault or negligence whatever on his part, was unaware of the
107 battered and worn condition of said clawbar, and did not know that the same was unsafe for use in drawing said bolt,' and the specific negligence averred is that defendants 'negligently and carelessly failed and neglected to furnish plaintiff a reasonably safe clawbar with which to work, and negligently furnished him a clawbar with which to draw said bolt that was old and battered and worn as aforesaid and unfit for the purpose for which it was provided and not reasonably safe for the work in which the plaintiff was engaged at the time he was injured,' etc.

"The defenses interposed by the answer are a general denial and pleas of assumed risk and contributory negligence. The jury returned a verdict for plaintiff for $5,000.00, and after their motions for a new trial and in arrest were overruled, defendants appealed.

"The pertinent facts disclosed by the evidence of plaintiff may be stated as follows: Plaintiff, who was 21 years old, and had been reared on a farm, entered the service of defendants as a common laborer in August, 1915, and worked for them until his injury in November of that year, his work being that of 'helping build steel bridges and taking down old ones'. Shortly before his injury the foreman in charge of the work of tearing down an old bridge ordered plaintiff to draw a certain drift bolt, which was about fifteen inches long and three-fourths of an inch in diameter, from the bridge cap, a timber sixteen feet long and twelve by twelve inches in its other dimensions. First, plaintiff cut out the wood from

around the bolt with an axe, then he struck the bolt sidewise with a maul to loosen it, and then he took up the clawbar, which was one of the tools provided by defendants, and, so far as the evidence discloses, the only clawbar at hand, and proceeded to draw the bolt out of the cap. The claws projected forward from the heel of the clawbar which rested on the cap and served as the fulcrum. On the first application of the power
108 exerted by plaintiff, who stood on the cap and pressed downward on the free end of the bar, the claws pressed upward on the head of the bolt and pulled the bolt out of the wood to the limit of the action of the claws. Then plaintiff raised the free end of the lever, inching the claws down the shank of the bolt and then, by twisting or turning the bar in his hands, endeavored to grasp the shank tightly between the claws so that the next application of power would be exerted at the place where the bolt was being held in that grip. The men called this inching process 'Arkansawing the bolt', and the evidence of plaintiff tends to show that such was the customary, as well as the most expeditious, method of pulling bolts, while the evidence of defendants is to the effect that the customary and safer method was to block up under the heel after each pulling of the bolt, so that the claws at each application of the power would press directly against the bolt head and be held thereby from slipping. Plaintiff states that in 'Arkansawing the bolt' he endeavored by turning the bar to obtain a firm hold on the shank, but that the claws had become so rounded and dulled by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.

"Further, plaintiff states, that to discover the defect required the inspection of the under side of the tool and that in obeying the order of the foreman to draw the bolt he did not pause to make such inspection, but proceeded to use the tool without any but a casual inspection of its top surface, which did not reveal the presence of the defect. The railroad on which plaintiff was working was engaged in interstate commerce, and the case was properly tried by both parties on the theory that the cause of action, if any, inured to plaintiff, fell within the purview of the Federal Employers' Liability Act."

The Court of Appeals held that the plaintiff assumed the risk of using a simple tool, where the con-
109 dition thereof was open and obvious. If further details of the evidence becomes necessary they can best be given in the course of the opinion.

I.

The assignment of errors in this court are (1) refusal of a demurrer to the testimony at the close of plaintiff's case, (2) refusal of such demurrer at the close of the whole case, (3) refusal to give instruction 3 as asked by defendant and in modifying same and giving it as modified, (4) refusal to give instruction No. 7 for defendant, and (5) refusal to give instruction No. 12 for defendant.

An examination of these assignments of error in the light of the pleadings, proof and instructions, the real questions are (1) was the negligence of defendant shown by the proof, and (2) did the plaintiff assume the risk, when he did the act in the manner in which he did it, and with the tool used? Under the

Federal law, contributory negligence is not a bar to recovery, but may be considered by the jury in determining the damages. So that if defendants are right in urging their demurrer to the testimony, it must be upon one or the other grounds mentioned above, *i. e.*, no negligence on the part of the defendants, or plaintiff assumed the risk, and that one or the other of these appear as a matter of law.

II.

The subjects of assumption of risk and contributory negligence are often confusedly discussed in the cases. In Fish v. Ry., 263 Mo. 106, this Court clarified the atmosphere to the extent of holding that there could be no assumption of risk except in cases where the relation of master and servant existed, which relation might be by either an express or an implied contract. The instant case is one which falls within the class of cases in which the doctrine of assumed risk may be invoked. The real question in the case is, whether or not the things charged to the plaintiff herein, by the pleadings and proof, are things properly classed
110 under the subject of assumed risks, or are they mere matters of contributory negligence?

We start with the rule that where one employs another to do a given work (thus creating the relationship of master and servant), the latter (the servant) assumes the ordinary and usual risks incident to such employment. We then advance to another simple and well-defined rule, that it is the duty of the employer to furnish to the employe a reasonably safe place within which to perform the work, and reasonably safe tools with which to per-

form it. These duties are what we denominate non-deligable duties. They rest upon the master, and if he leaves those duties to be performed by another, he is responsible for the performance. In other words, the master can never shift liability by saying that he had a competent person do these things for him. They are non-deligable duties in the sense that the master is always responsible for the faithful performance of them.

In the instant case the master furnished to the plaintiff a clawbar which, according to the evidence of the plaintiff, was not reasonably safe for the performance of the work assigned by the master to the servant. At least the jury could have found from the evidence that the tool as furnished was not reasonably safe for the performance of the work. The question then of the master's negligence was one for the jury, and the jury has found that the master was negligent. The simple tool doctrine urged by the defendant we discuss later. What we now want to make clear is the fact that there is evidence in this record from which a jury might well find that the master was negligent in the furnishing the clawbar used by the plaintiff, unless the simple tool doctrine changes the situation, and this doctrine can not change the situation, except upon two theories, *i. e.*, (1) that there is no negligence upon the master in furnishing to the servant a simple tool, which is defective, and (2) that by the use of such defective simple tool, the servant assumed the risk. But, as stated, we will
111 discuss simple tools later. What we now desire to discuss is the situation of the law, on the theory that the furnishing of the defective clawbar was

negligence upon the part of the defendant, as the jury has found.

It is the unbroken rule in Missouri that the servant never assumes the risk, where such risk grows out of the negligence of the master. (Fish v. Ry., 263 M., *l. c.* 125; Charlton v. Railroad, 200 M., *l. c.* 433; Patrum v. Railroad, 259 M., *l. c.* 124; George v. Railroad, 225 M., *l. c.* 407.) These cases and the causes cited therein thoroughly state the rule and reasons therefor. Thus in the Charlton case, it is said:

> "*(b)* Assumption of risks rests on contract—negligence rests in tort. (Dale v. Hill-O'Meara Construction Co., 108 Mo. App., *l. c.* 97.) The servant when he enters his master's employ, impliedly agrees with him, for the compensation named, to assume the risk of usual dangers incident to the work. But the servant does not assume the risk of the master's negligence, for a very good reason, and that is, because it is a fundamental proposition that it is against public policy for a master to contract against his own negligence. So, too, in the assumption of risks by a servant, it is well to consider a certain assumption by the master, and that is, that the master impliedly contracts with the servant that he will exercise ordinary care to protect such servant from injury by providing a reasonably safe place for him to work. When these two assumptions are considered as proceeding hand in hand, it will be perceived that the risks assumed by the servant are those risks alone which remain after the master has exercised ordinary care."

To like effect, Faris, J., in Patrum v. Railroad, *supra*, said:

> "The moment negligence comes in at the door

it may well be said that the doctrine of assumption of risk goes out at the window. (Curtis v. McNair, 173 Mo. 270; Brady v. Railroad, 206 Mo. 509; Tinkle v. Railroad, 212 Mo. 445; Huston v. Railroad, 129 Mo. App. 576.) We have here in Missouri, whether logically or illogically we need
112 not here pause to discuss, come to use the term 'assumption of risk' to express the mere hazards which appertain to a dangerous avocation when unaffected by the negligence of the master. When, however, the servant enters into or remains in the service of the master with actual or constructive knowledge of defects arising from the master's negligence and without a promise of remedy, we speak of this in our Missouri courts as contributory negligence."

Now, in the instant case, if the furnishing of the worn and battered clawbar was negligence upon the part of the master, then under the Missouri rule, so long and so firmly fixed, there is no assumption of risk in the use of such tool. If the tool was so patently defective that an ordinarily careful and prudent man would not have used it, then we have the plaintiff doing what an ordinarily careful and prudent man would not have done, having in view his own self-protection, and such use would be negligence upon his part, which negligence contributed to his injury. In other words, we would have negligence upon the part of defendant, and contributory negligence upon the part of the plaintiff. But under the Federal law this contributory negligence does not bar a recovery, but may be only shown to reduce the damages. If, therefore, the furnishing of this clawbar, in its defective condition, was negligence upon the part of the

master, there is no assumption of risk in the case, and the most there is for the defendant is the alleged contributory negligence, and the demurrers to the evidence could not be sustained on that ground, under the Federal law.

III.

In Fish v. Ry. Co., 263 M. 106, we properly held that under the Federal statutes there were two classes of cases, (1) a class of cases wherein the assumption of risk could not be invoked, and (2) a class of cases wherein the defendant could invoke the doctrine of assumed risk. With this ruling we are fully satisfied, and the case now before us is within the latter class,
113 above named. But in the Fish case, *supra*, we further held that as to the class of cases wherein the doctrine of assumed risk could be invoked, such assumed risk must be determined by the common law rule, and to this doctrine we now adhere. Not only so, but we say now, in plain terms, what was inferentially said in the Fish case, and that is, by the common law rule, we mean the rule of the common law, as it has been announced by the Missouri courts. That rule is, that the servant never assumes a risk where such risk is the outgrowth of the master's negligent act. In Missouri the use of a glaringly defective tool may show negligence upon the part of the party so using it, but such party does not assume the risk which was created by the negligent act of the master in furnishing such tool. In such cases we hold that the plaintiff can not recover on the ground of his own negligence, *i. e.*, his doing a thing which an ordinarily careful and prudent man would not have done, having

in view his own safety. In the Fish case, *supra*, we denominated this contributory negligence, and we still adhere to that rule. The Fish case is not the only Missouri case so to announce, but, on the contrary, many cases so hold. If assumption of risk grows out of the contractual relation of master and servant, as our cases hold, then there is no other place to give such acts of the servant, than to the field of contributory negligence. The risks he assumes are those he contracted to assume, *i. e.*, those necessarily incident to the work. Not risks which grow out of negligence, whether such negligence comes from the one contracting party or from the other. If the neglect is that of the master, we simply denominate it negligence. If the neglect is that of the servant, and he is suing for the neglect of the master, we denominate it contributory negligence. To illustrate by the case at bar: It was the duty of the master to furnish the servant a reasonably safe clawbar with which to do the work. The failure to furnish that character of a clawbar was negligence upon the part of the master. If the defects were so glaring, and the clawbar so
114 patently defective that an ordinarily prudent servant would not have used it, then its use under such circumstances was negligence upon the part of the servant, which negligence under the rule in Missouri would bar him from a recovery. But not so under the Federal statute.

IV.

So that we reach this point, in this case, if we were right in the Fish case, the Court of Appeals is wrong in the opinion certified with the case to this court.

We are not shaken from our views in the Fish case. Under the ruling of that case there is no assumption of risk in the case at bar, if there was negligence upon the part of the master in furnishing the kind of clawbar that was furnished. The evidence was such as to authorize the submission of the question of the master's negligence to the jury, and the jury has found the master negligent. The matter of plaintiff's contributory negligence was submitted to the jury by proper instruction under the Federal act, which permitted the jury to consider the same in reducing damages.

Whatever the rule as to assumption of risk may be in other jurisdictions, we are satisfied with the Missouri rule. We are as yet not convinced that we were wrong in the Fish case when we said that in the class of cases under the Federal statute, wherein assumption of risk could be invoked as a defense, that such assumption of risk was that of the common law as interpreted by this court, in cases tried in our court. As this court interprets the common law, there can be no assumption of a risk occasioned by the negligence of the master. We find no Federal case discussing the right of this court to apply its common law rule in determining whether or not the defense of assumed risk is in a case. Until the higher court says we can not apply the common law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the Fish and previous cases, *i. e.*, that the servant
115 never assumes a risk which is the outgrowth of the master's negligence, and further that if such servant remain in a glaringly unsafe place, or use a glaringly

defective tool, negligently furnished by the master, such servant is guilty of contributory negligence, but has not assumed the risk occasioned by the negligence of the master.

V.

We now come to the simple tool doctrine urged by the defendants. As indicated above, this so-called doctrine can not avail the defendants, except upon one of two theories, *i. e.,* (1) that it is not negligence upon the part of the master to furnish a tool which is not reasonably safe for the performance of the work, if such is of simple mechanism and not a complicated one, and (2) that the servant assumed the risk of using such tool.

What we have previously said practically disposes of this question. It is negligence for a master to furnish a tool which is not reasonably safe to be used on the work, and we care not what the character of the tool, in so far as the negligence of the master is concerned. Because the contract of hiring called for a reasonably safe place wherein to work, and reasonably safe tools with which to work. When we say the contract of hiring, we mean such a contract of hiring as we have before us in the present case. If the master says to the servant, I have a certain work to do, and here are the tools you must use, and the servant accepts the employment, we might have a different case, but that is not this case, nor do we say we would have a different case, because the contracting against his own negligence might be factor. However, we had better adhere to the case here.

Going back to the so-called simple tool doctrine, what is there to be found in it? In its last analysis

it is nothing more than that of contributory negligence. A servant picks up a hoe, an axe, or a claw-bar, and if the defects are open and glaring, and so open and glaring that a reasonably prudent person
116 would not undertake to use them in the work being done, then the use of the tool would not be the exercise of ordinary care upon his part for his own protection. This failure to use ordinary care is negligence, and if he sues the master for the master's neglect in furnishing an unsafe tool, the master may respond and say the tool was a simple device, and any ordinary person could have seen and known the defects thereof, and in using it in that condition you have been guilty of negligence which contributed to your injury, and you can not recover. To my mind that is all there is in the so-called simple tool doctrine in states like Missouri, where we have fixed views upon assumed risk. You can show the simple character of the tool, and the obviousness of the defects, to show contributory negligence.

VI.

What we have said practically disposes of another contention made, *i. e.*, that the servant having chosen the more dangerous of two methods of doing work, assumed the risk incident to the method chosen. Here again the courts of this state denominate this act contributory negligence and not assumption of risk. (Montgomery v. Railroad, 109 M. A., *l. c.* 94; Moore v. Ry. Co., 146 M., *l. c.* 582.)

In the Moore case, *supra*, Williams, J., quotes with approval the following from Bailey on Personal In-

juries Relating to Master and Servant, Vol. I, Section 1123:

> "Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and can not recover."

And this is sound, in my judgment. If a servant choose the more dangerous of two ways open to him, he is failing to do (for his own protection) that which an ordinarily careful and prudent person would do. Such failure is negligence on his part, and where
117 such negligence is invoked as a defense by the defendant in a lawsuit, the law denominates it contributory negligence.

VII.

As indicated, the rule announced in the Court of Appeals contravenes the rule in the Fish and other cases from this court. It held that the plaintiff was barred because he had assumed the risk. To this we do not agree. Whilst the defendant has made five assignments of error, set forth above, they all raise the questions which we have discussed, and raise none other. In our judgment this case was well tried by the court *nisi*, and its judgment should be affirmed. It is so ordered. All concur.

W. W. Graves, C. J.

118 And thereafter, on the 8th day of December, 1917, a motion for rehearing was filed by the appellants in said cause in said Supreme Court, which said motion is in the following words and figures, to wit:

In the Supreme Court of Missouri.

In Banc.

October Term, 1917.

Allega Williams, Respondent, vs. Edward B. Pryor and Edward F. Kearney, Receivers of the Wabash Railroad Company, Appellants.	No. 20077.

APPELLANTS' MOTION FOR REHEARING.

Now come the above-named appellants and pray the Court for an order granting a rehearing herein, for the following reasons:

1. Because the Court overlooked questions decisive of this case and duly presented by counsel in their brief.

2. Because appellants claim and assert immunity from legal liability for the damages claimed by the petition filed herein, under and by virtue of the act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their employes in Certain Cases", approved April 22, 1908, and amended by act of April 5, 1910, commonly known as the Federal Employer's Liability Act; and the decision of this Court is against such claim of immunity.

3. Because the said decision erroneously holds that under the provisions of the said Federal Employer's Liability Act, the plaintiff could not, under any cir-

cumstances, assume the risk of negligence of appellants in furnishing to him a defective clawbar with which to perform his work, because under the provisions of said Employer's Liability Act, as interpreted and applied by the Supreme Court of the United States in the cases of Seaboard Air Line Railroad v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway Company, 241 U. S. 229, the plaintiff did assume the risks of injury arising from the defects in said clawbar, of which he had knowledge, or which were so obvious that an ordinarily prudent person
119 under the circumstances would have observed and appreciated.

4. The Court erroneously refuses to apply to the facts of this case the rules respecting the defense of assumption of risk as expounded and applied by the Supreme Court of the United States; and erroneously decides that in a case under the Federal Employer's Liability Act, tried in the courts of this state, the defense of assumption of risk is available to the appellants only to the extent that said defense is limited by the decisions of this Court, whereas, it is the duty of this Court, in entering judgment in causes of action arising under said Employer's Liability Act, to expound, interpret and give effect to said act in accordance with the rule of decision with respect thereto as established and promulgated by the decisions of the Supreme Court of the United States, in the cases hereinabove mentioned.

5. Because the decision and judgment of this Court is in conflict with the controlling decisions of the Supreme Court of the United States, to wit, Seaboard

Air Line Railroad v. Horton, 233 U. S. 492; Jacobs v. Southern Railway Company, 241 U. S. 229.

Respectfully submitted,

J. L. Minnis,
N. S. Brown,
J. A. Collet,
Attorneys for Appellants.

120 And thereafter, on the 22nd day of December, 1917, the following further proceedings in said cause were had and entered of record in said Supreme Court of Missouri, to wit:

Allega Williams, Respondent,
vs.
Edward B. Pryor *et al.*, Appellants.
No. 20077.

Now at this day the Court having fully considered and understood the motion heretofore filed by the said appellants for a rehearing herein, doth order that said motion be, and the same is hereby overruled.

121 State of Missouri—Set.

I, Jacob D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages present a full, true and correct copy of the record and proceedings in the case of Allega Williams, Respondent, v. Edward B. Pryor and Edward F. Kearney, Receivers of the Wabash Railroad Company, Appellants, No. 20077, including copy

of the judgment of the Circuit Court of Charito County, Missouri, and of the order of said Circu Court allowing an appeal from said judgment to th Kansas City Court of Appeals, printed abstract o the record and record entries in said cause, opinio of the said Kansas City Court of Appeals, motion fo a rehearing filed by the said respondent in sai Kansas City Court of Appeals, and order of sai Court of Appeals overruling said motion for a rehea ing and transferring said cause to the said Suprem Court of the State of Missouri, as fully and completel as the same appear of record and on file in my offic

In Testimony Whereof, I have hereunto set m h - and attached the official seal of said Suprem Court of the State of Missouri, at my office in th City of Jefferson, State aforesaid, this 4th day o January, A. D. 1918.

J. P. Allen,
Clerk of the Supreme Cour
of the State of Missouri.

(Seal)

In the Supreme Court of Missouri.

No. 20,077.

ALLEGA WILLIAMS, Respondent,

vs.

EDWARD B. PRYOR and EDWARD F. KEARNEY, Receivers of The Wabash Railroad Company, Appellants.

Stipulation as to Return of Transcript of Record under Writ of Certiorari.

It is hereby stipulated and agreed between counsel for the respective parties above named, that the Transcript of Record in this cause now on file in the Clerk's office of the Supreme Court of the United States, shall stand and be accepted and considered as the Transcript of Record to be returned to that Court by the Clerk of the Supreme Court of the State of Missouri, under the writ of Certiorari issued March 11, 1918.

H. J. WEST,
ROY W. RUCKER,
Counsel for Respondent.
JAMES L. MINNIS,
N. S. BROWN,
Counsel for Appellants.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the stipulation filed in the above-entitled cause, as fully as the same appears on file in my office.

Given under my hand and the seal of said Court at the City of Jefferson, State aforesaid, this 9th day of April, 1918.

[Seal Supreme Court State of Missouri.]

J. D. ALLEN,
Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which Edward B. Pryor and Edward F. Kearney, Receivers of the Wabash Railroad Company, are appellants, and Allega Williams is respondent, No. 20077, which suit was removed into the said Supreme Court by virtue of an appeal from the Chariton County Circuit Court,

and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of March, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,318. Supreme Court of the United States, No. 851, October Term, 1917. Edward B. Pryor et al., etc., vs. Allega Williams. Writ of Certiorari.

[Endorsed:] File No. 26,318. Supreme Court U. S. October term, 1917. Term No. 851. Edward B. Pryor et al., etc., Petitioners, vs. Allega Williams. Writ of certiorari and return. Filed April 13, 1918.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. [redacted]

EDWARD D. PRYOR and EDWARD J. KEARNEY, as Executors of the WABASH RAILROAD COMPANY,

Defendants,

—against—

ALLEGA WILLIAMS,

Plaintiff.

PETITION FOR WRIT OF CERTIORARI, NOTICE OF APPLICATION, AND PROOF OF SERVICE.

JAMES L. MORRIS,
A. S. BROWN,
Counsel for Petitioners.
Railway Exchange Building,
St. Louis, Missouri.

Art Metro Law Printing Co., 304-6 Pine St., St. Louis, Mo. 1916

INDEX.

List of Cases Cited:

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. .....

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners,

—against—

ALLEGA WILLIAMS,
Respondent.

NOTICE OF SUBMISSION OF PETITION FOR WRIT OF CERTIORARI.

To Allega Williams, Respondent, or Roy W. Rucker, Esquire, His Attorney of Record:

Take notice that the petitioners above named will, on the 11th day of February 1918, at 12 o'clock noon, or as soon thereafter as counsel can be heard in the Supreme Court room, City of Washington, District of Columbia, submit to this Court the annexed petition for writ of *certiorari*, and the annexed brief

in support thereof, upon a copy of the transcript of the record herein, duly certified under the seal of the Supreme Court of Missouri.

St. Louis, Missouri, this 25th day of January 1918.

James L. Minnis

N. D. Brown

Counsel for Petitioners.

Service of the foregoing notice and papers therein mentioned together with a copy of the transcript of record in this cause is acknowledged this 26th day of January 1918.

Roy N. Ruskin

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. .....

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners,

—against—

ALLEGA WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF ON BEHALF OF PETITIONERS.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioners, Edward B. Pryor and Edward F. Kearney, as Receivers of the Wabash Railroad Company, make this, their petition for a writ of *certiorari*, directed to the Supreme Court of the State of Missouri, and in support thereof respectfully show:

I.

The decision of the Supreme Court of the State of Missouri, which your petitioners seek to have reviewed by this Court, affirmed a judgment entered in the Circuit Court of Chariton County, Missouri, against your petitioners and in favor of respondent, in the sum of $5,000.00, as damages for personal injuries suffered by respondent while in the employ of your petitioners.

Respondent's cause of action was based upon the Federal Employers Liability Act. Respondent at the time of the accident was engaged in tearing down a trestle bridge on the line of the Wabash Railroad, near Ottumwa, Iowa. While using a tool known as a claw bar for the purpose of pulling a bridge bolt of twelve or fourteen inches in length from the bridge timbers, the claw bar slipped from the stem of the bolt, causing respondent to fall to the ground, a distance of twelve or fourteen feet.

The Supreme Court of Missouri, by its decision in this cause, refused to follow and give effect to the rule of the Federal courts defining the scope and effect of the defense of assumption of risk, and held that, where the employe continued to use a defective tool or appliance, with actual or implied knowledge of the defect, and the risk arising from such use, he was only guilty of contributory negligence. There-

fore, the important question involved is whether, in an action under the Federal Employers Liability Act, the rights and obligations of the parties to the suit depend upon said Act and the applicable principles of the common law as interpreted and applied by this Court, or upon the principles of the common law as interpreted and applied by the Supreme Court of the State of Missouri.

II.

On January 8, 1916, respondent filed his petition in the Circuit Court of Chariton County, Missouri, against your petitioners to recover the sum of $15,000.00, damages for personal injuries received by respondent on November 4, 1915. The petition, in substance (Rec., p. 7), alleges that plaintiff was in the employ and service of petitioners as a laborer in the track department of said Wabash Railroad, and was engaged, with other servants and employes of the petitioners, in taking down an old bridge over a stream known as Village Creek, near Ottumwa, Iowa, on the line of said railroad, preparatory to the building of a new bridge over said stream; that while respondent was working on said bridge he was ordered and directed by the foreman in charge of the work to draw a certain drift bolt from one of the bridge caps in said bridge; that said drift bolt was

a large iron or steel bolt about twelve inches long, securely fastened into said bridge cap, and that said bridge cap was a wooden cap or beam about twelve inches square and about thirty-six feet long, used in the construction of said bridge. That for the purpose of drawing said bolt the respondent was provided by petitioners with a certain claw bar, being an iron or steel bar about four or five feet long, with claws and a heel at one end, to be used by taking hold of the bolt with the claws, using the heel as a fulcrum and pressing down on the other end of the bar. That after respondent had cut the wood from around the head of said bolt so as to insert the claws of the claw bar underneath the head of the bolt, and had drawn the bolt as far as possible while using the head of the bolt to hold the bar, he took another hold on said bolt with the claws of said bar and undertook to further draw said bolt by pressing down on the other end of the bar; that while respondent was so pressing down on said bar in his effort to draw said bolt, and while he was pressing down on said bar with considerable force, but only such force as was necessary in order to draw the bolt, the claws on said bar, being much battered and worn, suddenly slipped on said bolt, whereby respondent was caused to fall from his position on said bridge cap to the ground below, a distance of twelve or sixteen feet, falling upon and striking with great force and vio-

lence certain timbers and piling there situate, whereby respondent was greatly and seriously hurt and bruised upon and about his whole body.

That said claw bar was caused to slip on said bolt and the respondent was caused to fall and to be hurt and injured by reason of the claws on said bar having become battered and worn to such extent that they would not take a firm hold on the bolt that was being drawn, and that because of such battered and worn condition of said claws the said claw bar was rendered dangerous and not reasonably safe for the work in which respondent was engaged at the time of his injury. That respondent without any fault or negligence whatever on his part, was unaware of the battered and worn condition of said claw bar, and did not know that the same was unsafe for use in drawing said bolt.

That it was the duty of petitioners to use ordinary care to furnish respondent reasonably safe tools and appliances with which to work, and it was their duty to make reasonable and timely inspection and repairs thereto, to the end that the tools and appliances furnished him with which to work might be reasonably safe and suitable for the work he was required to do; but that petitioners negligently and carelessly failed and neglected to exercise such care and negligently and carelessly failed and neglected to furnish respondent a reasonably

safe claw bar with which to work, and negligently and carelessly furnished him a claw bar with which to draw said bolt that was old and battered and worn and unfit for the purpose for which it was provided and not reasonably safe for the work in which the respondent was engaged at the time he was injured; that the petitioners knew or by the exercise of ordinary care in the inspection of said claw bar should have known the defective, unfit and unsafe condition thereof as aforesaid, before the same was furnished to the respondent with which to draw said bolt, and in time to have repaired the same before it was furnished to him for that purpose, but that they negligently and carelessly failed and neglected to make reasonable, timely and necessary repair thereto.

In due time petitioners filed their answer to said petition denying the charges of negligence contained therein, and specially pleaded the defenses of contributory negligence and assumption of risk on the part of the respondent. These special pleas are as follows (Rec., p. 13):

1. Further answering said amended petition, defendants say that all the injuries, if any, complained of in plaintiff's petition, as having been suffered by him, were directly contributed and occasioned by his own carelessness and negligence.

2. Further answering said amended petition, de-

fendants say that the alleged injuries complained of in plaintiff's petition, as having been suffered by him, on account of which this action is prosecuted, arose out of the risk of the employment in which plaintiff was engaged, and of which he had full notice and knowledge, and that plaintiff, by entering and continuing in said employment, with full notice and knowledge of the dangers incident thereto, voluntarily assumed all of said risks.

On the 12th day of February, 1916, the case was tried in the Circuit Court of Chariton County, Missouri, and resulted in a judgment of $5,000.00, in favor of respondent and against your petitioners. After unsuccessful motions for new trial and in arrest of judgment your petitioners perfected their appeal to the Kansas City Court of Appeals of the State of Missouri, pursuant to the local statute.

On November 6, 1916, the said Kansas City Court of Appeals rendered its decision in said cause, reversing the judgment entered in the Circuit Court of Chariton County (Orig. Rec., p. 92; Pt., p. 83).

On November 16, 1916, respondent filed his motion for a rehearing of said cause in the said Kansas City Court of Appeals, for the following reason (Orig. Rec., p. 100; Pt., p. 90):

> "Respondent is denied the right to recover in this case on the theory that the Federal rule of

assumption of risk must be followed by this Court."

On November 27, 1916, the said Kansas City Court of Appeals overruled respondent's motion for a rehearing, but one of the Judges of said court, considering their opinion to be in conflict with the decision of the Supreme Court of Missouri, rendered in the case of Fish v. Chicago, Rock Island and Pacific Railroad, 263 Mo. 106, caused the said Court of Appeals to certify the said cause to the Supreme Court of the State of Missouri, pursuant to the local statute.

In due time the record in said cause was duly certified by said Kansas City Court of Appeals to the Supreme Court of Missouri.

On December 1, 1917, the said Supreme Court rendered its decision in said cause overruling the decision of the said Kansas City Court of Appeals, and affirming the judgment of the Circuit Court of Chariton County (Orig. Rec., p. 106; Pt., p. 97).

On December 8, 1917, your petitioners filed their motion for a rehearing of said cause in the Supreme Court of the State of Missouri, assigning the following reasons therefor (Orig. Rec., p. 118; Pt., p. 111):

(1) Because appellants (petitioners) claim and assert immunity from legal liability for the damages claimed by the petition filed herein, under and by virtue of the Act of Congress, entitled, "An Act Re-

lating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases", approved April 22, 1908, and amended by act of April 5, 1910, commonly known as the Federal Employers' Liability Act; and the decision of this Court is against such claim of immunity.

(2) The said decision erroneously holds that under the provisions of the said Federal Employers' Liability Act, the plaintiff (respondent) could not, under any circumstances, assume the risk of negligence of appellants (petitioners) in furnishing to him a defective claw bar with which to perform his work, because under the provisions of said Employers' Liability Act as interpreted and applied by the Supreme Court of the United States in the cases of Seaboard Air Line Railroad v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway Company, 241 U. S. 229, the plaintiff (respondent) did assume the risks of injury arising from the defects in said claw bar, of which he had knowledge, or which were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated.

(3) That the Court erroneously refused to apply to the facts in this case the rules respecting the defense of assumption of risk as expounded and applied by the Supreme Court of the United States; and erroneously decides that in a case under the Federal Employers' Liability Act, tried in the courts of this

state, the defense of assumption of risk is available to the appellants (petitioners) only to the extent that said defense is limited by the decisions of this Court, whereas, it is the duty of this Court in entering judgment in causes of action arising under said Employers' Liability Act, to expound, interpret and give effect to said act in accordance with the rule of decision with respect thereto as established and promulgated by the decisions of the Supreme Court of the United States, in the cases hereinabove mentioned.

(4) Because the decision and judgment of this Court is in conflict with the controlling decisions of the Supreme Court of the United States in the cases of Seaboard Air Line v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway Company, 241 U. S. 229.

On the 22nd day of December, 1917, said Supreme Court of Missouri overruled petitioners' motion for rehearing, and the said judgment of said Court is the final judgment in this cause of the highest court of said state.

III.

The pertinent facts as found by said Kansas City Court of Appeals (Orig. Rec., p. 96; Pt., p. 85), and adopted by the said Supreme Court (Orig. Rec., p. 106; Pt., p. 97) are as follows:

"Plaintiff who was 21 years old and had been reared on a farm, entered the service of defendants as a common laborer in August, 1915, and worked for them until his injury in November of that year, his work being that of "helping build steel bridges and taking down old ones". Shortly before his injury the foreman in charge of the work of tearing down an old bridge, ordered plaintiff to draw a certain drift bolt, which was about fifteen inches long and three-fourths of an inch in diameter, from the bridge cap, a timber sixteeen feet long and twelve by twelve inches in its other dimensions. First, plaintiff cut the wood from around the bolt with an axe, then he struck the bolt sidewise with a maul to loosen it, and then he took up the claw bar, which was one of the tools provided by defendants, and, so far as the evidence discloses, the only claw bar at hand, and proceeded to draw the bolt out of the cap. The claws projected forward from the heel of the claw bar, which rested on the cap and served as the fulcrum. On the first application of the power exerted by plaintiff, who stood on the cap and pressed downward on the free end of the bar, the claws pressed upward on the head of the bolt and pulled the bolt out of the wood to the limit of the action of the claws. Then plaintiff raised the free end of the lever, inching the claws down the shank of the bolt and then by twisting or turning the bar in his hands, endeavored to grasp the shank tightly between the claws, so that the next application of power would be exerted at the place where

the bolt was being held in that grip. The men called this inching process "Arkansawing the bolt", and the evidence of plaintiff tends to show that such was the customary as well as the most expeditious method of pulling bolts, while the evidence of defendants is to the effect that the customary and safer method was to block up under the heel after each pulling of the bolt, so that the claws at each application of the power would press directly against the bolt head and be held thereby from slipping. Plaintiff states that in "Arkansawing the bolt", he endeavored by turning the bar to obtain a firm hold on the shank, but that the claws had become so rounded and dulled by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.

* * * * * * *

The railroad on which plaintiff was working was engaged in interstate commerce and the case was properly tried by both parties on the theory that the cause of action, if any, inured to plaintiff, fell within the purview of the Federal Employers Liability Act. * * * The defect in the claw bar was so obvious that the most cursory and superficial inspection would have disclosed it to plaintiff (Orig. Rec., p. 99; Pt., p. 89). * * * The claw bar was battered and worn and a mere look at the claws would have disclosed the battered, rounded edges and would have proclaimed to the most common understanding that such edges

could not be made to take firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

In its opinion, the Supreme Court of Missouri held:

(1) That petitioners furnished to respondent a claw bar that was not reasonably safe for the performance of the work assigned by petitioners to respondent, and that the question of petitioners' negligence in that respect was one for the jury.

(2) That the furnishing of the worn and battered claw bar was negligence on the part of petitioners.

(3) That when respondent entered into or remained in the service of petitioners with actual or constructive knowledge of the defects and dangers arising from petitioners' said negligence, and without a promise of remedy, he was merely guilty of contributory negligence under the rule of the common law as interpreted and applied by said Supreme Court.

(4) That under the rule of the common law as interpreted and applied by said Supreme Court, respondent did not assume the risk of injury from using a defective claw bar, even though he had actual or implied knowledge of the defects and fully appreciated the risks incurred from such use.

(5) That in cases arising under the Federal Employers Liability Act the scope and effect of the defense of assumption of risk must be determined by the common-law rule, as it has been announced and applied by the Missouri courts, and not by the common-law rule as has been announced and applied by the Supreme Court of the United States.

The Supreme Court of Missouri refused to give effect to petitioners' defense of assumption of risk in this case as announced by the repeated decisions in this court, and particularly in the cases of Seaboard Air Line Railroad v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway, 241 U. S. 229, which said rule may be stated as follows:

> That the employe does not assume risks not naturally incident to the occupation, and which arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work, until he becomes aware of the defect or disrepair, and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.
>
> When, however, the employe does know of the defect and appreciates the risk that is attributable to it, or the defect and risk are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated

them, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe does assume the risk, even though it arise out of the master's breach of duty to furnish reasonably safe tools and appliances for the work.

IV.

The question involved in this cause is of great importance, because if the decision of the Supreme Court of Missouri is allowed to stand, the result will be that the rights and obligations of the masters and servants coming within the purview of the Federal Employers Liability Act will lack that uniformity of administration which is essential to carry out the obvious intent of Congress in adopting this important legislation with respect to the railroads of the country and their employes.

As pointed out by this Court in the case of New York Central, Etc., R. R. v. Beaham, 242 U. S. 148-151:

> "the transactions in question related to interstate commerce; the consequent rights and liabilities depend upon acts of Congress, agreement between the parties and common-law principles accepted and enforced in Federal Courts."

And in the case of Southern Railway v. Gray, 241 U. S. 333, 338, 339:

> "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal Courts."

Obviously, the defense of assumption of risk in a case arising under the Federal Employers' Liability Act must be given the same force and effect by the courts of the State of Missouri as in the courts of each and every other state of the Union.

It is submitted that this Court, by its decisions in the cases of Seaboard Air Line Railroad v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway, 241 U. S. 229, has adopted the rule of decision that it is the duty of the courts of the several states to determine the rights and obligations of the parties, in causes of action under the Federal Employers' Liability Act, in accordance with the principles of the common law as interpreted and applied by this Court. But the Supreme Court of the State of Missouri, by its decision in this cause, has expressly refused to give effect to petitioners' defense of assumption of risk, in accordance with the principles of the common law as interpreted and applied by this Court.

Wherefore, petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the

seal of this Court, directed to the Judges of the Supreme Court of the State of Missouri, commanding them, and each of them, to certify to and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court in the case lately pending therein, entitled, "Allega Williams, Respondent, v. Edward B. Pryor and Edward F. Kearney, as Receivers of the Wabash Railroad Company, Appellants," and being number 20077, as provided by Act of Congress, approved September 6th, 1916, amending Section 237 of the Judicial Code, to the end that the judgment of said Supreme Court in the said cause may be reviewed, as provided by law, and that your petitioners may have such other and further relief in the premises as to this Court may seem proper and in conformity with law.

And your petitioners will ever pray, etc.

EDWARD B. PRYOR and
EDWARD F. KEARNEY,
as Receivers of the Wabash Railroad Company.

By Edward F. Kearney
One of said Receivers.

I hereby certify that I have examined the foregoing and annexed petition and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

James L. Minnis,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. .....

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners.

—against—

ALLEGA WILLIAMS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petition for writ of *certiorari* to the Supreme Court of the State of Missouri, to review a decision of said Court affirming a judgment against petitioners and in favor of respondent in the sum of $5,000.00, in a cause of action based upon the Federal Employers' Liability Act.

The case was tried in the Circuit Court of Chariton County, Missouri, and the jury returned a verdict for the sum stated. In due time petitioners appealed the case to the Kansas City Court of Appeals, pursuant to the local statute. Thereafter the Kansas City Court of Appeals rendered its decision in said cause reversing the judgment of the trial court, and held that respondent had, in the circumstances shown by the evidence, assumed the risk of the injuries received, under the rules of the common law as applied by the Federal courts. Respondent filed a motion for rehearing in said Court of Appeals upon the sole ground that the said Court erred in its opinion in interpreting and applying the doctrine of assumption of risk in accordance with the Federal rule, contrary to the rule adopted by the Supreme Court of the State of Missouri in a prior case, to wit, Fish v. Chicago, Rock Island and Pacific Railroad, 263 Mo. 106, wherein said Supreme Court held that the defense of assumption of risk in a cause of action based upon the Federal Employers' Liability Act should be interpreted and applied in accordance with the rules of the common law as interpreted by the Supreme Court of said state, and not by the rule of the Federal courts. Thereafter the said Kansas City Court of Appeals overruled respondent's motion for rehearing, but certified the said cause to the Supreme Court of said state, pursuant to local practice, because one

of the Judges of said Court of Appeals considered their opinion in this cause in conflict with the decision of the Supreme Court of said state in the Fish case. In due time the Supreme Court of said state rendered its decision in said cause, wherein they reaffirmed the doctrine announced by them in the Fish case, and stated in language unmistakable that the defense of assumption of risk in cases tried in the courts of that state, and arising under the Federal Employers' Liability Act, should be given the scope and effect, and such scope and effect only, as said doctrine was limited by the rules of the common law as interpreted and applied by said Court, and expressly refused to follow and apply the rules of the Federal Courts with respect to said defense in such cases. By its decision the Supreme Court of said state firmly announced their doctrine that the employe never assumes the risk of injury where the evidence shows that the employer failed in his duty to furnish the employe a reasonably safe place or reasonably safe tools or appliances with which to perform the work, even though the employe at the time of entering the employment knew of such defects and the risks arising therefrom, or the defects and risks were so obvious to the employe that it should be presumed that he had knowledge thereof and appreciated the danger.

The facts in the case as found by the Kansas City Court of Appeals, and adopted by the Supreme Court of Missouri as the basis for its decision, are fully set forth in the petition filed herein (*ante*, p. 12), and need not be here repeated.

ARGUMENT.

I.

The Federal Question.

Since the cause of action is expressly based upon the Federal Employers' Liability Act, it is obvious that a Federal question is involved.

Southern Railway v. Gray, 241 U. S., *l. c.* 338-339;
Kansas City, Etc., Ry. Co. v. Jones, 241 U. S. 181;
New York, Etc., R. R. v. Beaham, 242 U. S. 148-151.

II.

The Decision of the Supreme Court of the State of Missouri Is Erroneous Because in Conflict With the Ruling Decisions of This Court.

The cardinal questions here involved are: (1) Is the defense of assumption of risk, in a suit brought in a state court and based upon the Federal Employers' Liability Act, to be given effect according to the applicable principles of the common law as interpreted and applied by this Court; and is it the duty of the courts of the several states, in such circumstances, to follow such Federal rule of decision

in passing judgment on said defense; and (2) did the Supreme Court of Missouri err in its construction of the said Act with respect to the scope and effect of the defense of assumption of risk?

It is submitted that both of the questions just stated have been answered by this Court in the affirmative by the decisions in Seaboard Air Line R. R. v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway, 241 U. S. 229. But, as heretofore stated, the Supreme Court of said state refused to follow the rule of decision established in said cases, and on the contrary held that the defense of assumption of risk in such cases was to be interpreted and applied in accordance with the rule of decision established by the highest court of that state.

For the convenience of the Court we make the following statement and extensive excerpts from the opinions of the Court in the above cases.

In the Horton case the controlling points of decision were:

(1) Whether the statute of North Carolina, which expressly abolished the defense of assumption of risk in all cases where the evidence tended to show that the employer was guilty of negligence in furnishing defective machinery, ways and appliances for the use of the employe could be given effect in an action based on the Federal Employers' Liability Act; and (2) whether the defense of assumption of risk should

be interpreted and applied in accordance with the Federal rule of decision.

In that case plaintiff sued the railroad company to recover damages for personal injuries sustained by him while in defendant's employ as a locomotive engineer. His evidence tended to show that on the date of the accident he was in charge of defendant's locomotive engine; that the engine was equipped with a water gauge, a device attached to the boiler head, for the purpose of showing the level of the water in the boiler, and consisting of a brass frame or case inclosing a thin glass tube which comunicated with the boiler above and below, in such manner that the tube received water and steam direct from the boiler and under the full boiler pressure. In order to shield the engineer from injury in case of the bursting of the tube, a piece of ordinary glass known as a guard glass should have been provided, this being a part of the regular equipment of the water gauge. But defendant had failed to provide this guard glass, and by reason of this failure, plaintiff was injured by the bursting of the water gauge. There was evidence tending to show that plaintiff had knowledge of the fact that the guard glass had been removed from around the water gauge, and that he appreciated the danger of injury by reason of its absence. Under instructions of the Court, the case was sub-

mitted to the jury upon three issues, to which responses were made, as follows:

> 1. Was the plaintiff injured by defendant's negligence? Answer. Yes.
> 2. If so, did plaintiff assume the risk of injury? Answer. No.
> 3. Did plaintiff by his own negligence contribute to his injury? Answer. Yes.

In considering the case upon its merits this Court said (*l. c.* 499):

> "We need consider only certain assignments of error that are based upon exceptions to the action of the trial judge in giving and refusing to give instructions relating to the issues of defendant's negligence, the assumption of risk, and contributory negligence."

Continuing, this Court said (*l. c.* 499):

> "At the outset we observe that the Judge evidently misapprehended the effect of the Federal Act upon state legislation. Thus, the jury was told that plaintiff had brought the action under the Federal statute; 'and where Congress enacts a law, within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law, the state law is superseded, but where there is no conflict **expressed by the statute** of the United States, then the rule of the state pre-

vails.' This, of course, in the absence of a specific statement of the applicable rule of the state law, might be treated as academic. But the theory was carried into the specific instructions, to the extent that upon the question of the employer's duty and the assumption of risk by the employe, the charge was modeled rather upon the North Carolina statute than upon the Act of Congress. By Sec. 2646, Nor. Car., Revisal of 1905, 'Any servant or employe of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employe who shall have suffered death in the course of his services or employment with such company **by the negligence, carelessness or incompetence of any other servant, employe or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.** Any contract or agreement, expressed or implied, made by any employe of such company to waive the benefit of this section shall be null and void.'

"Upon the issue of defendant's negligence the trial court charged the jury as follows: 'It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work.' And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place or work and of the appliances for the work. Thus: 'If you find from the evidence that it (locomotive engine) was turned over to him without the

guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue "Yes".'

"**In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute.** But it is settled that since Congress, by the Act of 1908, took possession of the field of the employer's liability to employes in interstate transportation by rail, all state laws upon the subject are superseded (Second Employers Liability Cases, 223 U. S. 1, 55)."

The Court then proceeds to examine and interpret Sections 1, 3 and 4 of the Federal Act, and says (*l. c.* 503):

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases **such assumption shall have its former effect as a complete bar to the action.** And, taking sections 3 and 4 together,

there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employe, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, **while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.**

"The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. On the other hand, assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But

risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. (Choctaw, Oklahoma & Gulf R. Co. v. McDade, 191 U. S. 64, 68; Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 220 U. S. 590, 596; Tex. & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 321; Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 102, and cases cited).

"When the employe does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employe relying upon the promise, does not assume the risk, unless at least the danger be so imminent that no ordinarily prudent man, under the circumstances would rely upon such promise (Hough v. Railway Co., 100 U. S. 213, 224; Southwestern

Brewery v. Schmidt, 226 U. S. 162, 168). This branch of the law of master and servant seems to be traceable to Holmes v. Clark, 6 Hurl. & Norm. 348; Clarke v. Holmes, 7 Hurl. & Norm. 937.

"In the light of these principles, the rulings of the trial court in the case at bar must be considered.

"Defendant specifically requested an instruction that **plaintiff's right to recover damages was to be determined by the provisions of the Federal Act,** and that 'if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious, and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes".' **The Court gave this instruction as applicable to the issue of contributory negligence, and instead of the words 'then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes",' used the words, 'then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue "Yes".'** To the refusal to give the instruction as requested, and the modification of it, defendant excepted.

"The trial court evidently deemed, as did the State Supreme Court, that the topic of assumption

of risk, with reference to the circumstances of the case, was sufficiently and properly covered by an instruction actually given as follows, after stating in general terms that 'A man assumes the risk, when he takes employment, incident to the class of work which he has to perform', but that 'He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work', the Court proceeded as follows:

" 'On the other hand, the employer has the right to assume that his employe will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care.'

"It will be observed that by this instruction the application of the rule of assumption of risk was conditioned upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here, again, the Court appears

to have followed the local statute, rather than the act of Congress; for Section 2646, Nor. Car. Revisal of 1905, already quoted, has been held by the State Supreme Court to abolish assumption of risk as a bar to an action by a railroad employe for an injury attributable to defective appliances furnished by the employer (Coley v. Railroad Co., 128 Nor. Car. 534). **The trial court, while recognizing that the act of Congress applied so far as its terms extended, and that by its terms the employe is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employes contributed to the injury, at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the state law.** An instruction to the jury to this effect preceded the instructions we have just quoted.

"It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the Safety Appliance Act, or any other law passed by Congress for the safety of employes, in force at the time this action arose. But the necessary result of this is, not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the **ordinary** application of the common-law rule. **The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject matter.**

"By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27. This, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time and was subsequently broken. But by the common law, with respect to the assumption by the employe of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employe and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water gauge without giving notice of the defect to the defendant or its representative, he assumed the risk.

"**Defendant was entitled to have the requested instruction given respecting assumption of risk,** and as the charge actually given did not cover the same ground, there was error.

"Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in

the manner requested by defendant, the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the consequence of a finding of contributory negligence.

"The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion." (Bold-face type ours.)

In *Jacobs v. Southern Railway*, 241 U. S. 229, the Supreme Court had occasion again to consider the question whether the defense of assumption of risk was to be applied as that doctrine is defined and applied by the statute or ruling of law of the several states, or as defined by this Court under the Federal law.

Plaintiff was in the service of the defendant as a fireman. He received injuries while attempting to get on a moving locomotive. The negligence charged was the causing and permitting to be within dangerous proximity to the tracks of the company a pile of loose cinders over which plaintiff stumbled and slipped and was drawn under the locomotive. The defendant asserted the defense of assumption of risk. In that case the plaintiff testified:

"I had knowledge of it, of the cinders being there, but I didn't know that it was dangerous. I had forgotten them being there at the time. I

was watching when I was going to step on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile—it was not in my mind."

The jury found for the defendant and this finding was affirmed by the Virginia Supreme Court of Appeals. Thereupon, plaintiff sued out a writ of error to this Court and complained of the action of the trial court in instructing the jury as follows:

"The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress, approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

Plaintiff also complained of the action of the trial court in refusing instructions which presented these propositions (*l. c.* 233):

"(1) The unsafe character or condition of the

railway was of itself no defense to the injury caused thereby.

"(2) Knowledge of it by plaintiff might constitute contributory negligence and diminish the amount of recovery.

"(3) If the company suffered or permitted the cinders to be placed and to accumulate alongside of its main line in dangerous proximity to the railroad track or right-of-way, and plaintiff's injury resulted in whole or in part from such negligence, or if the cinders constituted a defect or insufficiency in the railroad track, the verdict should be for plaintiff.

"(4) Knowledge of the existence of the cinders would not bar recovery, but it might be considered with other evidence in determining whether plaintiff was guilty of contributory negligence, and if guilty recovery would not be barred, but the amount of recovery would be diminished in proportion to such negligence.

"(5) To charge plaintiff with contributory negligence he must not only have known of the cinders, but also the danger occasioned by them, or that the danger was so obvious that a man of ordinary prudence would have appreciated it and not have attempted to get upon the engine at the time and under the circumstances disclosed by the evidence."

In ruling upon the correctness of the decisions of the state courts in the giving and refusal to give the instructions stated, this Court said (*l. c.* 233):

"The rulings of the trial court and Supreme

Court of Appeals upon the instruction given and those refused make the question here, and represent the opposing contentions of the parties. The railway company contends that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. The plaintiff, on the other hand, insists that such knowledge and conduct amounted, at the utmost, to no more than contributory negligence, and should not have barred recovery, though it might have reduced the amount of recovery. Indeetl, plaintiff goes farther and contends that, whatever might have been the evidence respecting his knowledge or lack of knowledge of the danger, he did not assume the risk if the company was negligent; and, further, that employes' continuance in service with knowledge of a dangerous condition and without complaint does not bar recovery under the Act of Congress. He concedes, however, that he encounters in opposition to his contentions the ruling in Seaboard Air Line v. Horton, 223 U. S. 492, and therefore asks a review of that case, asserting that 'the considerations upon which the true construction of the act depends were not suggested to the Court'.

"The argument to sustain the assertion and to present what he deems to be the true construction of the act is elaborate and involved. It would extend this opinion too much to answer it in detail. He does not express it through a comparison of the sections of the act, and insists that to retain the common-law doctrine of the assump-

tion of risk is to put the fourth section in conflict with the other sections. **The basis of the contention is that the act was intended to be punitive of negligence, and does not cast on the employes of carriers the assumption of risk of any condition or situation caused by such negligence.** This is manifest, it is insisted, from the provisions of the third section of the act, which provides that the contributory negligence of the employe 'shall not bar a recovery', and of the fifth section, which precludes the carrier from exempting itself from liability. This purpose is executed, and can only be executed, it is urged, by construing the words of section 4 (which we shall presently quote) to apply to 'the ordinary risks inherent in the business—the unavoidable risks which are intrinsic notwithstanding the performance by the carrier of its personal duties. They do not include the "secondary and ulterior" risks arising from abnormal dangers due to the employer's negligence.' And, further: **'The object of this section was not to adopt, by implication, the common-law defense of assumption of risk of such abnormal dangers.** Its object was in express terms to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the "risks of his employment" assumed by the employe.'

"These, then, are the considerations which plaintiff says were not submitted to the Court in the Horton case, and which he urges to support his contention that assumption of risk has been abolished absolutely.

"We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language, and makes it express one meaning when it intended another.

"The language of section 4 demonstrates its meaning. It provides that in any action brought by an employe he 'shall not be held to have assumed the risks of his employment in any case where the violation by said common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe'. It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employes. In other cases, therefore, it is retained. And such is the ruling in the Horton case, made upon due consideration and analysis of the statute and those to which it referred. It was said: 'It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action'. And there was a comparison made of section 4 with the other sections and the relation and meaning of each determined and the preservation by the statute of the distinction between assumption of risk and contributory negligence, which was pronounced 'simple', although 'sometimes overlooked'. Cases were cited in which the distinction was recognized and applied (page 504).

"It is, however, contended that the conditions of the application of assumption of risk were not

established and that 'to charge a servant with assumption of risk the evidence (1) must show that he was "chargeable with knowledge of the material conditions which were the immediate cause of his injury", and (2) must establish his "appreciation of the dangers produced by the abnormal conditions".' The testimony of plaintiff is adduced to show that these conditions did not exist in his case.

"He admitted a knowledge of the 'material conditions', and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding 'not over a gallon' could be considered as not having appreciated the danger and assumed the risk of the situation **because he had forgotten their existence** at the time and did not notice them. We think his situation brought him within the rule of the cases (Gila Valley Ry. v. Hall, 232 U. S. 94).

"It is objected, however, that instruction A, 'viewed wholly with reference to common-law principles', is erroneous in that it omitted to state as an element the appreciation by plaintiff of the danger of the situation as necessary to his assumption of risk. But that objection was not made at the trial. The objection made was general, that the instruction did 'not correctly state the common-law doctrine of assumption of risk'. It was therefore very indeterminate, and we can not say that the Court considered that it was di-

rected to the omission to express or to bring into prominence the appreciation by plaintiff of the danger he incurred.

"The instruction was refused by the trial court upon the objection by plaintiff. It was considered by the Supreme Court of Appeals and plaintiff contended against it there only upon the ground that the assumption of risk was not available as a defense under the Act of Congress. **He made the contention there that he does here, and which we have already considered, that the Act of Congress precludes the defense of assumption of risk of any condition or situation caused by the negligence of a carrier.** And this was the full extent of plaintiff's contention. Had he made the specific one now made the Supreme Court of Appeals would have dealt with it, for the opinion of the Court shows a clear recognition of the elements necessary to the doctrine of assumption of risk and the trial court as well must have understood them; and we can not suppose that the Court discerned in plaintiff's general objection the specification which he now contends was necessary and which it was error to refuse." (Bold-face type ours.)

The Supreme Court of Missouri did not feel in duty bound to follow the rule of decision announced by this Court in the foregoing cases. That Court first considered the question here involved, in rendering its decision in the case of Fish v. Railroad, 263 Mo. 106, and reached the conclusion that the defense of

assumption of risk, being a common-law defense, was to be applied in accordance with the interpretation given to such defense by the rule of decision of that Court, even though the cause of action be based on the Federal Employers' Liability Act. The rule announced in the Fish case is reaffirmed by the decision of said Supreme Court in the instant case.

We quote the following excerpts from the opinion of said Court in the case at bar to demonstrate the conflict between the rule of decision therein established, and the rule announced by this Court in the Horton and Jacobs cases:

> "The subjects of assumption of risk, and contributory negligence are often confusedly discussed in the cases. In Fish v. Ry., 263 Mo. 106, this Court clarified the atmosphere to the extent of holding that there could be no assumption of risk, except in cases where the relation of master and servant existed, which relation might be by either an express or an implied contract. The instant case is one which falls within the class of cases in which the doctrine of assumed risk may be invoked. The real question in the case is, whether or not the things charged to the plaintiff herein, by the pleadings and proof, are things properly classed under the subject of assumed risks, **or are they mere matters of contributory negligence?**
>
> "We start with the rule that where one employs another to do a given work (thus creating

the relationship of master and servant), the latter (the servant) assumes the ordinary and usual risks incident to such employment. We then advance to another simple and well-defined rule, that it is the duty of the employer to furnish to the employe a reasonably safe place within which to perform the work, and reasonably safe tools with which to perform it. These duties are what we denominate non-delegable duties. They rest upon the master, and if he leaves those duties to be performed by another, he is responsible for the performance. In other words, the master can never shift liability by saying that he had a competent person do these things for him. They are non-delegable duties in the sense that the master is always responsible for the faithful performance of them.

"In the instant case the master furnished to the plaintiff a claw bar which, according to the evidence of the plaintiff, was not reasonably safe for the performance of the work assigned by the master to the servant. At least the jury could have found from the evidence that the tool as furnished was not reasonably safe for the performance of the work. The question then of the master's negligence was one for the jury, and the jury has found that the master was negligent. The simple tool doctrine urged by the defendant we discuss later. What we now want to make clear is the fact that there is evidence in this record from which a jury might well find that the master was negligent in the furnishing the claw bar used by the plaintiff, unless the simple tool doctrine changes the situation, and this doc-

trine can not change the situation, except upon two theories, *i. e.,* (1) that there is no negligence upon the master in furnishing to the servant a simple tool, which is defective, and (2) that by the use of such defective simple tool, the servant assumed the risk. But, as stated, we will discuss simple tools later. What we now desire to discuss is the situation of the law, on the theory that the furnishing of the defective claw bar was negligence upon the part of the defendant, as the jury has found.

"It is the unbroken rule in Missouri that the servant never assumes the risk, where such risk grows out of the negligence of the master (Fish v. Ry., 263 M., *l. c.* 125; Charlton v. Railroad, 200 M., *l. c.* 433; Patrum v. Railroad, 259 M., *l. c.* 124; George v. Railroad, 225 M., *l. c.* 407). These cases and the cases cited therein thoroughly state the rule and reasons therefor.

* * * * * * *

"We have here in Missouri, whether logically or illogically we need not here pause to discuss, come to use the term 'assumption of risk' to express the mere hazards which appertain to a dangerous avocation when unaffected by the negligence of the master.

"When, however, the servant enters into or remains in the service of the master with actual or constructive knowledge of defects arising from the master's negligence and without a promise of remedy, we speak of this in our Missouri courts as contributory negligence.

"Now, in the instant case, if the furnishing of the worn and battered claw bar was negligence upon the part of the master, then under the Missouri rule, so long and so firmly fixed, there is no assumption of risk in the use of such tool. If the tool was so patently defective that an ordinarily careful and prudent man would not have used it, then we have the plaintiff doing what an ordinarily careful and prudent man would not have done, having in view his own self-protection, and such use would be negligence upon his part, which negligence contributed to his injury. In other words, we would have negligence upon the part of defendant, and contributory negligence upon the part of the plaintiff. But under the Federal law this contributory negligence does not bar a recovery, but may be only shown to reduce the damages. If, therefore, the furnishing of this claw bar, in its defective condition, was negligence upon the part of the master, there is no assumption of risk in the case, and the most there is for the defendant is the alleged contributory negligence, and the demurrers to the evidence could not be sustained on that ground, under the Federal law.

"In Fish v. Ry. Co., 263 Mo. 106, we properly held that under the Federal statutes there were two classes of cases, (1) a class of cases wherein the assumption of risk could not be invoked, and (2) a class of cases wherein the defendant could invoke the doctrine of assumed risk. With this ruling we are fully satisfied, and the case now before us is within the latter class above named. But in the Fish case, *supra*, we further held that

as to the class of cases wherein the doctrine of assumed risk could be invoked, such assumed risk must be determined by the common-law rule, and to this doctrine we now adhere. **Not only so, but we say now, in plain terms, what was inferentially said in the Fish case, and that is, by the common-law rule, we mean the rule of the common law, as it had been announced by the Missouri courts.** That rule is, that the servant never assumes a risk where such risk is the outgrowth of the master's negligent act. In Missouri the use of a glaringly defective tool may show negligence upon the part of the party so using it, but such party does not assume the risk which was created by the negligent act of the master in furnishing such tool. In such cases we hold that the plaintiff can not recover on the ground of his own negligence, *i. e.*, his doing a thing which an ordinarily careful and prudent man would not have done, having in view his own safety. **In the Fish case, supra, we denominated this contributory negligence, and we still adhere to that rule.** The Fish case is not the only Missouri case so to announce, but, on the contrary, many cases so hold. If assumption of risk grows out of the contractual relation of master and servant, as our cases hold, then there is no other place to give such acts of the servant than to the field of contributory negligence. The risks he assumes are those he contracted to assume, *i. e.*, those necessarily incident to the work. Not risks which grow out of negligence, whether such negligence comes from the one contracting party or from the other. If the

neglect is that of the master, we simply denominate it negligence. If the neglect is that of the servant, and he is suing for the neglect of the master, we denominate it contributory negligence. To illustrate by the case at bar. It was the duty of the master to furnish the servant a reasonably safe claw bar with which to do the work. The failure to furnish that character of a claw bar was negligence upon the part of the master. If the defects were so glaring, and the claw bar so patently defective that an ordinarily prudent servant would not have used it, then its use under such circumstances was negligence upon the part of the servant, which negligence under the rule in Missouri would bar him from a recovery. But not so under the Federal statute.

"So that we reach this point, in this case, if we were right in the Fish case, the Court of Appeals is wrong in the opinion certified with the case to this Court. We are not shaken from our views in the Fish case. Under the ruling of that case, there is no assumption of risk in the case at bar, if there was negligence upon the part of the master in furnishing the kind of claw bar that was furnished. The evidence was such as to authorize the submission of the question of the master's negligence to the jury, and the jury has found the master negligent. The matter of plaintiff's contributory negligence was submitted to the jury by proper instruction under the Federal act, which permitted the jury to consider the same in reducing damages.

"Whatever the rule as to assumption of risk

may be in other jurisdictions, we are satisfied with the Missouri rule. **We are as yet not convinced that we were wrong in the Fish case when we said that in the class of cases under the Federal statute, wherein assumption of risk could be invoked as a defense, that such assumption of risk was that of the common law as interpreted by this Court, in cases tried in our Court.** As this Court interprets the common law, there can be no assumption of a risk occasioned by the negligence of the master. We find no Federal case discussing the right of this Court to apply its common-law rule in determining whether or not the defense of assumed risk is in a case. **Until the higher court says we can not apply the common-law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the Fish and previous cases, i. e., that the servant never assumes a risk which is the outgrowth of the master's negligence, and further, that if such servant remain in a glaringly unsafe place, or use a glaringly unsafe tool, negligently furnished by the master, such servant is guilty of contributory negligence, but has not assumed the risk occasioned by the negligence of the master.**

"We now come to the simple-tool doctrine urged by the defendants. As indicated above, this so-called doctrine can not avail the defendants, except upon one of two theories, *i. e.*, (1) that it is not negligence upon the part of the master to furnish a tool which is not reasonably safe for the performance of the work, if such is

of simple mechanism and not a complicated one, and (2) that the servant assumed the risk of using such tool.

"What we have previously said practically disposes of this question. It is negligence for a master to furnish a tool which is not reasonably safe to be used on the work, and we care not what the character of the tool, in so far as the negligence of the master is concerned. Because the contract of hiring called for a reasonably safe place wherein to work, and reasonably safe tools with which to work. When we say the contract of hiring, we mean such a contract of hiring as we have before us in the present case. If the master says to the servant I have certain work to do, and here are the tools you must use, and the servant accepts the employment, we might have a different case, but that is not this case, nor do we say we would have a different case, because the contracting against his own negligence might be a factor. However, we had better adhere to the case here.

"Going back to the so-called simple tool doctrine, what is there to be found in it? In its last analysis it is nothing more than that of contributory negligence. A servant picks up a hoe, an axe, or a claw bar, and if the defects are open and glaring, and so open and glaring that a reasonably prudent person would not undertake to use them in the work being done, then the use of the tool would not be the exercise of ordinary care upon his part for his own protection. This failure to use ordinary care is negligence, and if he sues the master for the master's neglect in fur-

nishing an unsafe tool, the master may respond and say the tool was a simple device, and any ordinary person could have seen and known the defects thereof, and in using it in that condition you have been guilty of negligence which contributed to your injury, and you can not recover. To my mind that is all there is in the so-called simple tool doctrine in states like Missouri, where we have fixed views upon assumed risk. You can show the simple character of the tool, and the obviousness of the defects, to show contributory negligence." (Bold-face type ours.)

It will be remembered that the Kansas City Court of Appeals found the facts in this case to be that:

> "The defect in the claw bar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff" (Orig. Rec., p. 99, Pt. 89).

And that:

> "The claw bar was battered and worn, and a mere look at the claws would have disclosed the battered, rounded edges and would have proclaimed to the most common understanding that such edges could not be made to take firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

It seems obvious, therefore, that if it was the duty of the Supreme Court of the State of Missouri to give effect to petitioners' defense of assumption of risk in the light of the facts as found by the Kansas City Court of Appeals, the decision of said Court is erroneous. It is equally obvious that, according to the rule of decision established by this Court in the Horton and Jacobs cases, *supra*, it was the clear duty of the Supreme Court of Missouri to interpret and give effect to the defense of assumption of risk, in accordance with the rule of decision established by this Court.

We, therefore, respectfully submit that it is a matter of great importance that the rights and obligations of the employers and employes coming within the purview of the Federal Employers' Liability Act shall be given a uniform application by courts of the several states. The only way such uniformity can be established is to require each of the state courts to follow the rule of decision with respect to the rights and obligations arising under said act, in accordance with the controlling decisions of this Court. As the decision of the Supreme Court of the State of Missouri is in obvious conflict with the rule established

by this Court, the petition for *certiorari* should be granted.

Respectfully submitted,

James L. Winning

N. D. Brannon,

.....,

Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. [redacted]26

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners.

vs.

ALLEGA WILLIAMS,
Respondent.

BRIEF ON BEHALF OF PETITIONERS.

JAMES L. MINNIS,
N. S. BROWN,
Counsel for Petitioners.

Railway Exchange Building,
St. Louis, Missouri.

St. Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1819.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 351.

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners.

vs.

ALLEGA WILLIAMS,
Respondent.

BRIEF ON BEHALF OF PETITIONERS.

STATEMENT.

This case is before the Court on *certiorari* to the Supreme Court of the State of Missouri to review the decision of said Court affirming a judgment against petitioners and in favor of respondent in the sum of $5,000.00, in the case wherein Allega Wil-

liams was plaintiff and your petitioners were defendants.

Respondent's cause of action is based upon the Employers' Liability Act. His suit was originally filed in the Circuit Court of Chariton County, Missouri, and on the trial thereof the jury returned a verdict, and judgment was entered in his favor for the sum stated. In due time petitioners appealed the case to the Kansas City Court of Appeals pursuant to local statute. Thereafter said Court of Appeals rendered its decision in the case, reversing the judgment of the trial Court, and held that respondent had, in the circumstances shown by the evidence, assumed the risk of the injuries received under the rules of the common law as adopted and enforced by the Federal Courts (Pt. Rec., p. 84, *et seq.*). Thereupon respondent filed his motion for rehearing in said Court of Appeals upon the sole ground that said Court erred in giving effect to the doctrine of assumption of risk in accordance with the Federal rule, contrary to the rule of decision adopted by the Supreme Court of the State of Missouri in a prior case, to wit, *Fish v. Chicago, Rock Island & Pacific Railway Co.*, 263 Mo. 106, wherein said Supreme Court held that the defense of assumption of risk, in a cause of action based on the Federal Employers' Liability Act, should be given effect in accordance with the rules of the common law as adopted and enforced

by the Supreme Court of said State, and not by the rule of the Federal Courts (Pt. Rec., p. 90). Thereafter the said Court of Appeals overruled respondent's motion for rehearing, but certified the cause to the Supreme Court of said State pursuant to local practice, because one of the Judges of said Court of Appeals considered their opinion to be in conflict with the decision of the Supreme Court of Missouri in the Fish case, *supra* (Pt. Rec., p. 95). In due time the Supreme Court of the State rendered its decision in the cause, wherein they reversed the decision of the Court of Appeals and reaffirmed the doctrine previously announced by them in the Fish case, *supra*, by stating in language unmistakable that the defense of assumption of risk in cases tried in the courts of that State and arising under the Federal Employers' Liability Act should be given force and effect—and such force and effect only—as that doctrine is limited by the rules of the common law as adopted and enforced by said Court; and expressly refused to follow and apply the rule of the Federal Courts with respect to that defense in such cases. By this opinion (Pt. Rec., p. 97, *et seq.*) the said Supreme Court announced their doctrine that the employe never assumes the risk of injury where the evidence tends to show that the employer failed in his duty to furnish the employe a reasonably safe place, or reasonably safe tools or

appliances with which to perform the work, even though the employe at the time of entering the employment knew of such defects and the risks arising therefrom, or the defects and risks were so obvious to the employe that it could be presumed that he had knowledge thereof and appreciated the danger.

The statement of facts as found by the Kansas City Court of Appeals was adopted by the Supreme Court of Missouri as the basis for its decision. As this statement fairly sets forth the nature of the pleadings as well as the facts adduced by the evidence on the trial of the case, we here set it forth (Pt. Rec., pp. 97-100).

> "This is an action for damages for personal injuries plaintiff alleges he sustained in consequence of negligence of defendants, his employers, who, at the time, were Receivers of the Wabash Railroad Company.
>
> Plaintiff, a laborer, was employed in the work of tearing down a bridge on the road near Ottumwa, Iowa, and was attempting to draw a bolt from a bridge cap with a clawbar when the claws slipped from their hold on the bolt, causing plaintiff, who was bearing down on the free end, to lose his balance and fall to the ground, a distance of twelve feet. The petition alleges 'that said clawbar was caused to slip on said bolt and the plaintiff was caused to be hurt and injured by reason of the claws on said bar having become battered and worn to such an extent that

they would not take a firm hold on the bolt that was being drawn and that because of such battered and worn condition of said claws, the said clawbar was rendered dangerous and not reasonably safe for the work in which plaintiff was engaged * * * and plaintiff, without any fault or negligence whatever on his part, was unaware of the battered and worn condition of said clawbar, and did not know that the same was unsafe for use in drawing said bolt,' and the specific negligence averred is that defendants 'negligently and carelessly failed and neglected to furnish plaintiff a reasonably safe clawbar with which to work, and negligently furnished him a clawbar with which to draw said bolt that was old and battered and worn as aforesaid and unfit for the purpose for which it was provided and not reasonably safe for the work in which the plaintiff was engaged at the time he was injured,' etc.

The defenses interposed by the answer are a general denial and pleas of assumed risk and contributory negligence. The jury returned a verdict for plaintiff for $5,000.00, and after their motions for a new trial and in arrest were overruled, defendants appealed.

The pertinent facts disclosed by the evidence of plaintiff may be stated as follows: Plaintiff, who was 21 years old, and had been reared on a farm, entered the service of defendants as a common laborer in August, 1915, and worked for them until his injury in November of that year, his work being that of 'helping build steel bridges and taking down old ones.' Shortly be-

fore his injury the foreman in charge of the work of tearing down an old bridge ordered plaintiff to draw a certain drift bolt, which was about fifteen inches long and three-fourths of an inch in diameter, from the bridge cap, a timber sixteen feet long and twelve by twelve inches in its other dimensions. First, plaintiff cut out the wood from around the bolt with an axe, then he struck the bolt sidewise with a maul to loosen it, and then he took up the clawbar, which was one of the tools provided by defendants, and, so far as the evidence discloses, the only clawbar at hand, and proceeded to draw the bolt out of the cap. The claws projected forward from the heel of the clawbar which rested on the cap and served as the fulcrum. On the first application of the power exerted by the plaintiff who stood on the cap and pressed downward on the free end of the bar, the claws pressed upward on the head of the bolt and pulled the bolt out of the wood to the limit of the action of the claws. Then plaintiff raised the free end of the lever, inching the claws down the shank of the bolt and then, by twisting or turning the bar in his hands, endeavored to grasp the shank tightly between the claws so that the next application of power would be exerted at the place where the bolt was being held in that grip. The men called this inching process 'Arkansawing the bolt,' and the evidence of plaintiff tends to show that such was the customary, as well as the most expeditious, method of pulling bolts, while the evidence of defendants is to the effect that the customary and safer method was to block up under the heel

after each pulling of the bolt, so that the claws at each application of the power would press directly against the bolt head and he held thereby from slipping. Plaintiff states that in 'Arkansawing the bolt' he endeavored by turning the bar to obtain a firm hold on the shank, but that the claws had become so rounded and dulled by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.

"Further, plaintiff states, that to discover the defect required the inspection of the under side of the tool, and that in obeying the order of the foreman to draw the bolt he did not pause to make such inspection, but proceeded to use the tool without any but a casual inspection of its top surface, which did not reveal the presence of the defect. The railroad on which plaintiff was working was engaged in interstate commerce, and the case was properly tried by both parties on the theory that the cause of action, if any, inured to plaintiff, fell within the purview of the Federal Employers Liability Act."

To the foregoing statement there should be added the following additional statement of facts made by the Kansas City Court of Appeals (Pt. Rec., p. 89):

"The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to plaintiff. A servant is not held to the duty of making a critical or ex-

tensive inspection of places or tools, but it is expected to be ordinarily attentive to his work and to make such discoveries as ordinary attention under the circumstances would have revealed.

"The clawbar was battered and worn, and a mere look at the claws would have disclosed the battered, rounded edges and would have proclaimed to the most common understanding that such edges could not be made to take firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

In overruling the decision of the Kansas City Court of Appeals, the Supreme Court of Missouri, in the course of its opinion, said:

"In the Fish case, *supra*, we further held that as to the class of cases wherein the doctrine of assumed risk could be invoked, such assumed risk must be determined by the common-law rule, and to this doctrine we now adhere. Not only so, but we say now in plain terms what was inferentially said in the Fish case, and that is, by the common-law rule, we mean the rule of the common law as it has been announced by the Missouri courts. That rule is, that the servant never assumes a risk where such risk is the outgrowth of the master's negligent act." (Pt. Rec.,

p. 105.) "* * * Whatever the rule as to assumption of risk may be in other jurisdictions, we are satisfied with the Missouri rule. We are not as yet convinced that we were wrong in the Fish case when we said that in the class of cases under the Federal statute (Employers Liability Act), wherein assumption of risk could be invoked as a defense, that such assumption of risk was that of the common law as interpreted by this Court, in cases tried in our own courts. As this Court interprets the common law, there can be no assumption of risk occasioned by the negligence of the master. We find no Federal case discussing the right of this Court to apply its common-law rule in determining whether or not the defense of assumed risk is in a case. Until the higher court says we cannot apply the common-law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the Fish and previous cases—*i. e.*, that the servant never assumes a risk which is the outgrowth of the master's negligence, and, further, that if such servant remain in a glaringly unsafe place or use a glaringly defective tool, negligently furnished by the master, such servant is guilty of contributory negligence, but has not assumed the risk occasioned by the negligence of the master." (Pt. Rec., pp. 107, 108.)

The rule of decision laid down by the Supreme Court of Missouri in the case at bar is not in accord with the rule of the common law as interpreted and

applied by this Court with respect to the scope and effect of the doctrine of assumption of risk as a defense, in cases arising under the Federal Employers Liability Act.

Therefore, the questions involved in the present review may be thus stated:

(1) Is the defense of assumption of risk, in a suit brought in a state court on a cause of action arising under the Federal Employers Liability Act, to be given effect according to the applicable principles of the common law as adopted and enforced by this Court; and is it the duty of the courts of the several states, in such circumstances, to follow such Federal rule of decision in passing judgment on such defense?

(2) Did the Supreme Court of Missouri err in its construction of said act with respect to the scope and effect of the defense of assumption of risk invoked by petitioners in the case at bar?

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Missouri erred in refusing to give effect to petitioners' defense of assumption of risk according to the rule of the common law as adopted and enforced by this Court.

2. The said Supreme Court erred in restricting and limiting petitioners' defense of assumption of risk according to the rule of local law adopted by said court.

POINTS AND AUTHORITIES.

I.

By the rule of the common law as adopted and enforced by this Court, a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. And the defense of assumption of risk according to the rule of common law is available in a case under the Federal Employers' Liability Act, except in the circumstances described in section 4 of the act.

Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492;
Jacobs v. Southern Ry. Co., 241 U. S. 229;
Chesapeake & Ohio Ry. Co. v. DeAtley, 241 U. S. 310, 313;
Erie R. R. Co. v. Purucker, 244 U. S. 320, 324;
Boldt v. Penna. R. R. Co., 245 U. S. 441, 445.

II.

The defense of assumption of risk in actions under the Federal Employers' Liability Act is a matter of substance and not subject to control by the statutes or the local rule of law adopted by the courts of the several States. It is the duty of the courts of the several States to give effect to the defense of assumption of risk, in actions under said act, in accordance with the

rule of the common law as adopted and enforced by this Court.

Seaboard Air Line Ry. v. Horton, *supra*;
Atchison & Topeka Ry. Co. v. Harold, 241 U. S. 371, 377;
New York Central R. R. Co. v. Winfield, 244 U. S. 147, 150;
New Orleans R. R. Co. v. Harris, 247 U. S. 367, 371.

III.

The decision of the Supreme Court of the State of Missouri in the case at bar is erroneous because in conflict with the ruling decisions of this Court with respect to the scope and effect of the defense of assumption of risk.

See Opinion Supreme Court Missouri (Printed Rec., p. 97 *et seq.*).

ARGUMENT.

Respondent, as we have seen, sued petitioners in the Circuit Court of Chariton County, Missouri, to recover damages for personal injuries sustained by him while in petitioners' employ as a bridge carpenter. The action was brought under the Federal Employers' Liability Act of April 22, 1908, as amended. At the time of the accident respondent was engaged in pulling what is known as a drift bolt from the timbers of a wooden bridge forming a part of the interstate line of railroad of which petitioners were receivers. In pulling the drift bolt respondent was using a tool known as a clawbar furnished to him by petitioners for that purpose. His petition alleged that the claws of the bar with which he was working were battered and dull, and, in using the clawbar to pull the drift bolt, the claws of the bar slipped from the bolt, causing plaintiff to fall a distance of approximately twelve feet, causing the injuries upon which his claim for damages is based.

The trial of the case resulted in a judgment for respondent. On appeal of petitioners to the Kansas City Court of Appeals of Missouri this judgment was reversed for the reason that "the defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to plaintiff. • • • The clawbar was battered and worn and a mere look

at the claws would have disclosed the battered rounded edges, and would have proclaimed to the most common understanding that such edges would not be made to take a firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which in the course of use would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it." (Pt. Rec., p. 89.)

Thereupon respondent filed in the Court of Appeals his motion for rehearing, alleging as reasons therefor that "Respondent is denied the right to recover in this case on the theory that the Federal rule of assumption of risk must be followed by this Court," and "that the decision of the Court of Appeals was in conflict with the decision of the Supreme Court of Missouri in the case of Fish v. R. R., 263 Mo. 106, where it was held 'that the meaning and effect of the United States Supreme Court's decision in the Horton case, wherein it is said the matter was left "open to the ordinary application of the common law rule," meant the common law rule as interpreted and enforced in the respective states' " (Pt. Rec., pp. 90, 91).

Thereafter, pursuant to the local practice, the Court of Appeals overruled respondent's motion for rehearing, and certified the case to the Supreme Court of Missouri for the reason that, in the opinion of one of the Judges, the decision was in conflict with a

prior decision of said Supreme Court in the Fish case, *supra* (Pt. Rec., p. 95). In due time the Supreme Court of Missouri rendered its decision and judgment in the case, reversing the decision of the Kansas City Court of Appeals, and affirmed the judgment of the trial court (272 Mo. 613, Pt. Rec., pp. 97 *et seq.*).

In reversing the opinion of the Court of Appeals, the Supreme Court held:

(1) That under the rule of the common law, as interpreted and applied by the Missouri courts, the servant never assumes a risk that is the outgrowth of the master's negligence.

(2) That where the servant knows of the defect in the machinery or appliances furnished by the master, and appreciates the risk that is attributable to it, and continues in the employment without objection or without obtaining from the master or his representative an assurance that the defect will be remedied, the servant is to be deemed guilty of contributory negligence.

(3) That under the Federal statute the contributory negligence of respondent in continuing to use the defective claw-bar with knowledge of the defect and appreciation of the risk arising from its use, did not bar a recovery, nor did respondent, because of such contributory negligence, assume the risk occasioned by petitioners' negligence in furnishing to respondent the defective claw-bar.

In the course of the opinion, the Supreme Court said:

> "Whatever the rule as to assumption of risk may be in other jurisdictions, we are satisfied with the Missouri rule. We are as yet not convinced that we were wrong in the Fish case when we said that in the class of cases under the Federal statute, where the assumption of risk could be invoked as a defense, such assumption of risk was that of the common law as interpreted by this court, in cases tried in our court. As this court interprets the common law, there can be no assumption of risk occasioned by the negligence of the master. We find no Federal case discussing the right of this court to apply this common law rule in determining whether or not the defense of assumed risk is in a case. Until the higher court says we cannot apply the common law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the Fish and previous cases, *i. e.*, that the servant never assumes a risk which is the outgrowth of the master's negligence; and, further, that if such servant remained in a glaringly unsafe place, or used a glaringly defective tool, negligently furnished by the master, such servant is guilty of contributory negligence, and has not assumed the risk occasioned by the negligence of the master."

Obviously the rule of decision adopted by the Supreme Court of Missouri is in conflict with the com-

mon law rule of assumed risk, as adopted and enforced by this Court, where the rule is well settled "that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him (Boldt v. Penna. R. R., 245 U. S. 441, 445 and 446, and other cases cited under Point I, *supra*).

Therefore it remains only to be considered whether the Supreme Court of Missouri erred in applying to petitioners' defense of assumption of risk the rule of the common law as restricted and limited by the decisions of the Missouri courts.

This court has repeatedly stated that "in proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts" (New Orleans and N. E. R. R. v. Harris, 247 U. S. 367, 371, and cases cited).

It was therefore the clear duty of the Supreme Court of Missouri to interpret and apply the defense of assumption of risk in this case in accordance with the rule of the common law as interpreted and applied by this court. Previous decisions of this court seem to settle the question.

In Seaboard Air Line v. Horton, 233 U. S. 492, one of the principal questions for decision was whether a statute of North Carolina making it the absolute duty of the employer to furnish his employe with safe

machinery, ways and appliances with which to perform his duties abrogated the defense of assumption of risk in actions brought under the Federal Act. The trial Court instructed the jury in line with the local statute. In holding that the trial court erred in this respect, this Court said, *l. c.* 504:

> "In these instructions the trial Judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employers' liability to employes in interstate transportation by rail, all said laws upon the subject are superseded. (Second Employers' Liability Cases, 223 U. S. 155.)"

In New Orleans & N. E. R. R. v. Harris, 247 U. S. 367, the question for decision was whether the Supreme Court of Mississippi erred in giving effect to the rule of evidence under the Mississippi statute known as the *prima facie* statute, in a case involving liability under the Federal Employers' Liability Act. This Court denied the right of the employe to invoke the provisions of the local statute, and said:

> "In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal

courts, and negligence is essential to recovery. * * * These established principles and our holding in Central Vermont Ry. Co. v. White, 238 U. S. 507-511-512, we think make it clear that the question of burden of proof is a matter of substance, and not subject to control by laws of the several states."

The cases just noticed involved the applicability of local statutes to actions arising under the Federal Act; but it is manifest that the same principles apply to rules of local general law adopted and enforced by the courts of the several states. Thus, in Atchison & Topeka Ry. Co. v. Harold, 241 U. S. 371, the question for decision was whether the Supreme Court of the State of Kansas erred in applying the local rule of law to determine the rights of the holder of an interstate bill of lading, when such local rule was in direct conflict with the general commercial law on the subject as repeatedly settled by this Court, and it was held to be the duty of the courts of the several states to determine the rights of a holder of such a bill of lading in accordance with the general commercial law on the subject as interpreted and applied by this Court. In the course of the opinion this Court said, *l. c.* 377:

"Whether, in the absence of legislation by Congress, the attributing to an interstate bill of lading of the exceptional and local character-

istic applied by the Court below in conflict with the general commercial rule constituted a direct burden on interstate commerce, and was, therefore, void, need not now be considered. This is so because, irrespective of that question, and indeed, without stopping to consider the general provisions of the Act to Regulate Commerce, it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (Act of June 29, 1906, c. 3591, Section 734, Stat. 593), was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder, which, in the nature of things, exclude state action."

* * * * * * *

"Indeed, in the argument it is frankly conceded that as the subject of a carrier's liability for loss or damage to goods moving in interstate commerce under a bill of lading is embraced by the Carmack Amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment because 'Congress has legislated relative to the one, but not relative to the other'. But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading—a purpose which would be wholly frustrated if the proposition relied upon were upheld. The principal subject of re-

sponsibility embraced by the Act of Congress carried with it necessarily the incidents thereto."

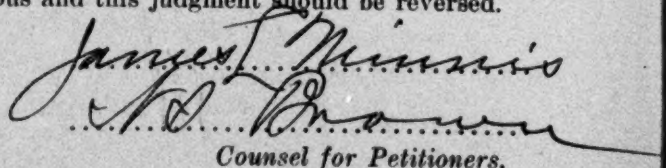
In Jacobs v. Southern Railway (241 U. S. 229), this Court re-examined the doctrine laid down in the Horton case, *supra*, with respect to the scope and effect of the defense of assumption of risk in actions brought under the Federal Act. In that case the Railway Company contended that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. Plaintiff, on the other hand, insisted that such knowledge and conduct amounted, at most, to no more than contributory negligence, and should not have barred recovery, though it might have reduced the amount of recovery. Plaintiff contended with great earnestness for an application of a modified rule of the common law which would exclude the defense of assumption of risk in such cases occasioned by the master's negligence, but this Court overruled the contention and said:

> "We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language and makes it express one meaning when it intended another."

It is clear from a review of the foregoing cases that the decision of the Supreme Court of Missouri in the instant case is in conflict with the ruling decisions of this Court on the question of the scope

and effect to be given the defense of assumption of risk in actions arising under the Federal Employers' Liability Act; and that it was the clear duty of the Missouri Court to give effect to petitioners' defense of assumed risk in the case at bar in accordance with the common-law rule as interpreted and applied by this Court. Obviously the prime object of the Federal Act was to bring about a uniform rule of responsibility as to interstate commerce in actions growing out of injuries to employes of railroads while engaged in such commerce. The Court well knows that in many of the states the common-law rule of assumption of risk, as applied by this Court, is in full force and effect, whereas in many of the other states such common-law rule has been modified either by state statutes or by rules of decision of the courts of those states. The only way a uniform rule of responsibility can be brought about in such cases is for this Court to place upon the courts of the several states the duty and responsibility of enforcing the Federal Act, and the necessary incidents thereto, in accordance with the rules adopted and applied in such cases by this Court.

It is therefore respectfully submitted that the decision of the Supreme Court of Missouri in this case is erroneous and this judgment should be reversed.



Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 26.

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners,

vs.

ALLEGA WILLIAMS,
Respondent.

BRIEF ON BEHALF OF RESPONDENTS

STATEMENT.

We adopt the statement made by the Kansas City Court of Appeals as far as contained in Petitioners Brief beginning at the middle of page 4 and ending with the paragraph on

page 7 which closes with the words, "Federal Employers Liability Act," with the following additions.

The clawbar was furnished by the master for the use of the entire bridge gang and was not in the individual custody nor for the individual use of the Plaintiff and it was the only clawbar on the job (p. 20). Two of Defendants' witnesses testified that it was the duty of the foreman to inspect this tool and he did inspect it. The foreman said that he inspected the tool and it was in a reasonably safe condition and was not made for any use which required that the edges of its claws be sharp and that "Arkansawing" was not a usual and ordinary or safe method of drawing a drift bolt.

Two of Defendants' witnesses, experienced bridgemen who have worked in this gang and with this tool for two and four years, respectively, had not discovered the defective condition of the bar until they examined it while on the stand at the trial, at which time they admitted its worn and battered condition.

Defendants contended below that the tool was not defective, but was reasonably safe.

At the trial below, the Defendants asked the Court to give thirteen instructions, of which the Court refused three, gave one as modified and gave nine as asked. These instructions, set out in full in the transcript at pages 73 to 79 and in our argument, show clearly that the trial Court submitted the case to the jury, on Defendants theory of contributory negligence and assumption of risks, and that was the Federal doctrine and not the Missouri doctrine.

POINTS AND AUTHORITIES.

I.

If the trial court correctly instructed the jury on the

assumption of risks, giving full scope to the Federal doctrine and not limiting petitioners defense of assumption of risk to the Missouri doctrine, it is wholly immaterial what views the Supreme Court of Missouri may have expressed in regard to the relative merits of the Federal and Missouri rules, or in regard to what the trial court should have done.

II.

If the trial court instructed the jury upon the Defendants (Petitioners) own theory of assumed risk, it is quite immaterial whether that theory was sound or not, and equally immaterial what the Supreme Court of Missouri may have considered the true rule.

III.

The assignment of an error to the Supreme Court of Missouri for refusing to apply the Federal doctrine of the assumption of risks, when in fact the trial court did apply the Federal rule (or at least the Defendants' conception of the Federal rule) does not properly raise the question as to whether the trial court correctly instructed the jury on the defense of the assumption of risk.

IV.

When a young man of very limited experience in bridge work, is told by his foreman, who is close at hand while the work is being done, to do a certain piece of work which requires the use of a clawbar which is furnished by the employer for the use of all the members of the bridge gang, and is not in the individual custody and for the individual use of the servant, which tool the employer makes it the duty of the foreman to inspect for defects; and where the evidence shows

that the defects of the tool were not so obvious as to be discernable by a mere casual inspection, but might have been discovered by a deliberate inspection of the tool, and the servant assuming that the tool was reasonably safe, and, having no actual knowledge of its defective condition, used the tool and was injured as a result of its defective condition and his own negligence, the trial court properly submitted the defense of the assumption of risk to the jury, and did not err in refusing to direct a verdict for the master.

V.

The record shows that the judgment was for the right party and therefor it will not be disturbed.

Chicago R. I. & P. Ry. Co. vs. Ward, 40 Supreme Court Reporter 275.

ARGUMENT.

Petitioners only specification of error is that the Supreme Court of Missouri erred in giving effect to petitionrs defense of the assumption of risk according to the Missouri rule instead of according to the Federal rule. (Petitioners Brief p. 11.)

Petitioners sole contention here is that the Supreme Court of Missouri applied the Missouri rule of assumption of risks instead of the Federal rule by which the servant is held to have assumed not only the risks ordinarily incident to the employment, but also those risks growing out of the master's negligence which are fully known to the servant or are so glaringly obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them, and hence the judgment should be reversed.

Our answer to petitioners contention is that the **Federal rule of the assumption of risks was applied by the trial court, and the case was properly submitted to the jury upon the petitioners own theory.**

If the record bears us out in this statement, then it is a question of purely academic interest and of no practical importance to this case, what the views of the Supreme Court of Missouri may be in regard to the true rule of the assumption of risks, or in regard to whether the Federal rule or the Missouri rule should be applied or was applied.

We now turn to the record for proof of our contention.

The plaintiffs instructions clearly recognized that the jury might find against the plaintiff on the ground that the Plaintiff assumed the risks of his employment, and the Plaintiff's general instruction (transcript p. 70) expressly refers to that defense.

The Defendants' conception of the doctrine of assumption of risks was given full recognition and their defense was submitted on their own theory as a reading of the instructions will clearly demonstrate. Defendants offered 13 instructions, of which those numbered 5, 6½, 9 and 10 do not relate to the assumption of risk or to contributory negligence. All of the instructions offered by them which touch upon either doctrine were as follows:

I (given).

The court instructs the jury that if you shall find and believe from the evidence in the case, that the work in which plaintiff was engaged at the time of his alleged injury, and the clawbar with which it was necessary for him to work while so engaged, were both simple, and that the plaintiff knew of any danger to him, if danger there was, in the prosecution of such work with the clawbar used by him, then what-

ever danger there may have been to plaintiff in using said clawbar, as he did, was assumed by him and he cannot recover.

2 (given).

The court instructs the jury that it was not the duty of defendants to furnish plaintiff with the newest, safest and most approved tools, and appliances with which to work, but that their only duty was to furnish reasonably safe tools and appliances. If, therefore, you shall find from the evidence that defendants did provide for plaintiff's use in the prosecution of the work in which he was engaged at the time of his alleged injury, reasonably safe and suitable tools, the character of the work in which he was engaged being considered, then there was no negligence committed by the defendants, and you must find for them.

3.

(Refused as offered, but italicized portion at the end added by the court and the modified instruction given by the court.)

If the jury shall find from the evidence that the usual ordinary and safe way in which to perform the work in which plaintiff was engaged at the time of his alleged injury, was for the workmen to place a block under the heel of the claw bar with which he was working in order that the claw bar might catch against the head of the bolt, and, if you shall further find that it was not reasonably safe, the circumstances considered, for the workmen to depend upon the claw bar catching the side of the bolt, and holding by reason of its contact with the side of the bolt, and, if you shall further

find from the evidence, that plaintiff was attempting to draw said bolt by the latter and less safe method, and was thereby injured, then plaintiff was himself guilty of contributory negligence.

You are further instructed in this connection, that if you shall find that the manner in which plaintiff was performing the labor in which he was engaged at the time of his injury, was not a seasonably safe method, the circumstances under which he was working considered, and that plaintiff himself realized said fact at the time he was undertaking the performance of the labor in that manner, and voluntarily chose to perform the labor in that manner, rather than to use the safer method of blocking up under the claw bar so as to enable him to lift with the claw bar holding against the head of the bolt, then, and in that event, plaintiff assumed all the risks of injury incident to the manner in which he was performing said labor, and the defendants are not liable for the injury resulting therefrom, "**and such fact will be considered by you in determining the amount of plaintiff's recovery, if any, under all the instructions.**"

4 (given).

The court instructs the jury that if the plaintiff undertook to perform the labor in which he was engaged at the time of his alleged injury with the claw bar in question, without any direction from his foreman as to the tool which should be used by him in doing such work, and that plaintiff selected the claw bar in question with which to do said work, and that whatever defects, if any there were in said claw bar, were apparent to him, then and in that event, plaintiff cannot recover, even though you may further find that the claw bar in question was not in a reasonably safe condition with which to perform the labor in which plaintiff was engaged.

6 (given).

The court instructs the jury that if you shall find that plaintiff was injured by reason of the claw bar with which he was working slipping on a bolt or drift pin, and causing him to fall, and if you shall further find that said claw bar slipped because of the manner in which it was being used by the plaintiff, or because said claw bar was dull, or for both of the aforesaid reasons, and not because of any latent or hidden defect, in said claw bar, and if you further find that the condition of the claw bar was apparent to plaintiff at the time then there can be no recovery, and your verdict must be for defendants.

7 (refused).

The court instructs the jury that a claw bar such as was used by plaintiff in this case, is what is known as a simple tool of which the master is not presumed to have greater or superior knowledge than the servant using such tool, and that no duty devolved on defendants to inspect such tool to ascertain its condition before permitting plaintiff to use the same, and you cannot find defendants guilty of negligence for failure to make inspection of said claw bar to ascertain its condition prior to permitting its use by plaintiff in the labor in which he was engaged at the time of his alleged injury.

8 (given).

The court instructs the jury that plaintiff in entering into the employment of the defendants, assumed the danger of all the risks ordinarily incident to such employment, and if you shall find from the evidence that the injury which resulted to him resulted from the danger which was ordinarily incident to the employment in which he was engaged, then

there can be no recovery in this case, and your verdict must be for defendants.

11 (refused).

The court instructs the jury that under the law and all the evidence in the case, your verdict and finding must be for defendants, and may be in the following form:

Allega Williams ..... Plaintiff

vs.

Edward B. Pryor, et al ..... Defendants

We, the jury, find the issues herein joined in favor of defendants.

.....

Foreman.

12 (refused).

The court instructs the jury that no duty devolved upon defendants to furnish plaintiff with the safest and best, or the newest claw bar that could be provided for his use in the work in which he was engaged, but defendants duty was entirely discharged if they provided him with a claw bar reasonably safe for the purposes for which it was intended to be used.

You are further instructed that "reasonably safe appliances and tools" as used in these instructions, means such appliances and tools as were commonly and ordinarily used in the business in which plaintiff was engaged.

These instructions as asked by the petitioners show that

the Defendants' theory in the trial Court of the doctrine of the assumption of risks which should be applied to this case and upon which the defendants should now stand or fall, is as follows; that plaintiff, entering into the employment of the Defendants, assumed all of the risk ordinarily incident to such employment (instruction 8). Furthermore, if the work in which he was engaged at the time of the injury and the claw bar were both simple, and the plaintiff knew of **any** danger in the prosecution of such work with the claw bar, then he assumed **whatever danger there may have been** in using the claw bar as he did (instruction 1). Furthermore, if the plaintiff undertook to do the work with the claw bar and if the plaintiff selected the claw bar, and if whatever defects it had, if any, were apparent to him, he could not recover because he assumed the risks; and if he was injured by the claw bar slipping on account of the manner in which it was used or because it was dull and not because of any latent defect, and if the condition of the claw bar was apparent to the plaintiff, he could not recover because he assumed the risk (instruction 6).

Defendants' instruction No. 3 which was refused as asked and was modified by the Court by the addition of the italicized matter and given as modified, was to the effect that if the jury should find that the usual safe way to draw out a drift pin was to block up under the heel of a clawbar so that the clawbar always caught against the head of the bolt, and that the process of Arkansawing the bolt was not a reasonably safe method, and that plaintiff was injured as a result of choosing an unsafe method, then he was guilty of contributory negligence, and, if plaintiff realized that the manner in which he was doing the work was not a reasonably safe method and chose the unsafe way, then he assumed the risk incident to the manner in which he was performing the labor and cannot recover. In short, drawing the drift pin by an unsafe method

when he might have followed the usual safe method, is contributory negligence, but doing the same thing with a realization of the risk is assumption of the risk and bars recovery.

This instruction as offered may reasonably be construed to mean either of two things:

1. That using an unsafe method when a usual and safe method is available is contributory negligence provided the servant does not realize the risk, but if he does realize the risk it becomes an assumed risk.

This is absurd on the face of it because there can be no choice without knowledge, and there can be no negligence without knowledge.

2. Or it may mean that the choice of an unsafe method where a safe method may have been known, is at the same time contributory negligence and an assumption of risks of the unsafe method, one of which reduces the damages and the other bars recovery. The fact that the instruction is reasonably susceptible of such an interpretation is ample reason for the court refusing to give it as offered.

However, the Court made an addition to the instruction which adopted the defendants' claim that it was contributory negligence to choose an unsafe method and gave the instruction. The amended instruction is just as sound as the defendants' theory. If it is erroneous, it is defendants' own error adopted by the Court.

As to whether or not the choice of an unsafe method when a safe method is available, is contributory negligence or assumption of risk does not arise in this case and is a question of purely academic interest. The defendants by their instruction No. 3 said that such choice was both contributory negligence and the assumption of the risks. The court therefore had a right to declare it to be either contributory negligence or assumption of risk, and if wrong, the defendant could not complain.

There can be but one other contention made by petitioners which is deserving of attention, and that is the claim that the trial Court erred in not giving, at the close of the case, instruction No. 12, a peremptory instruction to find for Defendants.

Does the application of the Federal rule of the assumption of risks require the Court to peremptorily instruct for Defendants, or should the Court have submitted the question of the assumption of risk to the jury?

Assuming for the moment that this question is brought to this Court by the petitioners' assignment of error (which we seriously doubt) and bearing in mind that petitioners have themselves asked the Court to hold that the choice of an unsafe method instead of the usual safe method is contributory negligence, does the evidence show without contradiction that the defects of the tool were known to the servant or were so glaringly obvious that an ordinarily careful man would have seen them?

The evidence was as follows:

Williams, the plaintiff, a young man 21 years of age, was raised on a farm and lived there until he went to work for the Wabash Railroad as a bridge laborer about three months before the injury. Bill Rickard, the boss, told Williams to draw a drift bolt from a bridge cap. This is done with a clawbar, which is a steel instrument five or six feet long with two claws and a heel at one end. There was a clawbar provided for the work and one only (p. 20) which Williams picked up about the middle, and noticing that it was not the one he had been using, he glanced at it and thought it was all right (p. 20). It seemed to be in a reasonably good condition and he didn't look farther (p. 30). He had never used this bar before.

He took it up by the handle end and made no close examination of the claw end. The boss was there and saw him

working and gave him no warning of the defective condition of the clawbar. A careful examination of the claw end from the underside, shows that it is battered and worn, but that condition would not appear without such an examination (p. 41). The clawbar was in court and exhibited to the jury (p. 41).

Defendants' witness McNown, a bridge builder of experience in Defendants' employ, testified that the worn and battered condition of the clawbar was the result of its use during the last two years (p. 47); that it is now duller than it was at the time of the injury, because of its use since then (p. 44); that the foreman examines the clawbars and when they become worn, orders them cast aside; that witness does not know how much more worn and battered it now is, though the clawbar is before him, because he has never examined it (p. 46).

Defendants' witness Davenport, also an experienced bridge builder, had worked with this clawbar for a long time, but had never examined it and had never noticed the worn and battered condition of the claws (p. 53) until on the witness stand, but when shown the clawbar admits its worn and battered condition.

Defendants' witness Rickard, the bridge foreman, knew the clawbar well. It was witness' duty to inspect the clawbar and the other tools and see that they were reasonably safe, and he did inspect this clawbar and passed it as safe, and would still pass it (pp. 60 and 61); that Plaintiff had used the bar before; that he told Plaintiff to pull the drift bolt; that there is no use to which clawbars are put that requires them to be sharp (p. 57).

Wm. Sailor, Defendants' witness, a bridgeman, testified that clawbars become worn from use; that this clawbar had been in use four years; that it is now more worn than at the time of the accident (p. 65).

Under this evidence the following reasons appear why

the Court should not hold that the defects in the tool were so obvious that the plaintiff either knew or should have known the defects.

The Plaintiff was a young and inexperienced hand who had been engaged in work of this character for less than three months prior to the time of the injury.

The tool was not an individual tool furnished for Plaintiff's individual use and placed in Plaintiff's custody, but it was for the use of the whole bridge gang, under the direction of and in the presence of the foreman.

The defendants had assumed to inspect this tool and the foreman had inspected the tool. We may fairly infer that the fact was known to Plaintiff because he assumed that the tool was free from defects.

That the defects of the tool were not so obvious as to be discernable by a mere casual inspection is shown by the evidence of the Plaintiff and of some of Defendants' witnesses. Defendants' witnesses, McNown and Davenport, both experienced bridge builders who had worked with this tool for a long time, did not know of its condition until they inspected it in the presence of the jury at the trial below, at which time they admitted that it was in a worn and battered condition.

The presence of the foreman who told the Plaintiff to do a thing requiring the use of this tool and the failure of the foreman to caution him in regard to the defects of the tool practically amount to an assurance by the master that the tool was not defective and might be used without inspection.

Furthermore, after Defendants have contended and produced evidence to prove that the tool was not defective but had been inspected and passed as a safe tool, Defendants should not now be heard to say that the defects in the tool which caused Plaintiff's injury were known to the Plaintiff

or were so obvious and glaring that the Plaintiff, as an ordinarily prudent man, should have observed the defects.

Therefore, the Plaintiff did not know the defects and should not be charged with knowledge of the defects of the tool furnished by the Defendants and which caused his injuries, and the trial court did not err in submitting to the jury the question as to whether the Defendants assumed the risk of using the tool.

We respectfully submit the judgment of the trial court should be affirmed.

Ray H. Lucas

Counsel for Respondent.

PRYOR ET AL., RECEIVERS OF THE WABASH RAILROAD COMPANY, v. WILLIAMS.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 26. Argued October 8, 1920.—Decided November 8, 1920.

Assumption of risk is a bar to the action, in a case governed by the Federal Employers' Liability Act, and does not, like contributory negligence, operate merely in reduction of damages. P. 45.

In an action governed by the Federal Act, where the injuries resulted from plaintiff's being furnished, and using, an obviously defective claw bar for drawing bolts, the Supreme Court of Missouri, applying a local construction of the common law, decided that, as the risk was attributable to his master's negligence, the plaintiff did not assume it, but was guilty of contributory negligence, which went only to the damages under the Federal Act. *Held*, erroneous under repeated decisions of this court defining the nature and effect of assumption of risk and adjudging that the Act prevails over state law. *Id.*

272 Missouri, 613, reversed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. James L. Minnis* and *Mr. N. S. Brown* were on the brief, for petitioners.

Mr. Roy W. Rucker for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for personal injuries based on Employers' Liability Act. Negligence is charged against petitioners as Receivers of the Wabash Railroad Company.

Respondent Williams, plaintiff in the action, was engaged in tearing down a bridge on the line of the railroad,

and a defect in a claw bar, which he was directed to use, caused the bar to slip while he was attempting to draw a bolt; in consequence, he lost his balance and fell to the ground, a distance of twelve feet. The defect, it is alleged, Williams did not know.

Negligence, however, was charged against him, and assumption of risk and contributory negligence.

He recovered a verdict in the sum of $5,000. Motions for new trial and arrest of judgment were denied, and the case was appealed to the Kansas City Court of Appeals.

The facts, as recited by the court, are that Williams was twenty-one years old, and had been reared on a farm. He entered the service of the railroad as a common laborer in August, 1915, and worked for it until his injury in November of that year, his work being that of "helping build steel bridges and taking down old ones." He was ordered by the foreman in charge of the work to use a claw bar which was defective, in that the claws "had become so rounded and dulled by long usage that they could not be made to grip the shank securely, and slipped from their hold when plaintiff [Williams] pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground."

The plaintiff stated that to discover the defect required an inspection of the underside of the tool, and that, in obeying the order of the foreman, he did not pause to make such inspection, but used the tool without any but casual inspection of its top surface, which did not reveal the defect.

The railroad was engaged in interstate commerce and the cause of action, under the case as made, fell within the purview of the Federal Employers' Liability Act.

The conclusion of the court was that "The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff." And further, "The risk was just as obvious as the

defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

The court reversed the judgment. It denied a motion for rehearing, but considered and adjudged "that on account of one of the Judges deeming the decision to be in conflict with *Fish* v. *Railway*, 236 Missouri, 106, 123, it is without jurisdiction, and therefore orders said cause certified to the Supreme Court for its determination."

The Supreme Court, upon considering *Fish* v. *Railway* and other cases, decided that "it was the duty of the master to furnish the servant a reasonably safe clawbar with which to do the work. The failure to furnish that character of a clawbar was negligence upon the part of the master. If the defects were so glaring, and the clawbar so patently defective that an ordinary prudent servant would not have used it, then its use under such circumstances was negligence upon the part of the servant, which negligence under the rule in Missouri would bar him from a recovery. But not so under the Federal statute." In other words, the court held that Williams' assumption of the risk did not have the consequence assigned to it by the Kansas City Court of Appeals, but, if it existed, amounted in legal effect only to contributory negligence, and that such negligence under the federal statute worked a reduction of damages and not a defeat of the action, and applying these elements of decision, adjudged that the "case was well tried by the court *nisi*, and its judgment should be affirmed." It was so ordered.

In its view of the federal statute and the defence under it, the court erred. *Seaboard Air Line Railway* v. *Horton*, 223 U. S. 492; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229; *Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310; *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320; *Boldt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441.

And the requirement of the act prevails over any state law. *Seaboard Air Line Railway* v. *Horton, supra; Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold*, 241 U. S. 371; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367.

Counsel for respondent, however, insists that the views of the Supreme Court upon the ruling of the assumption of risk is "of purely academic interest and of no practical importance" in the consideration of the legality of the verdict and judgment in the trial court. That court, it is said, submitted the fact to the jury and also submitted the relative contribution of Williams' negligence and the negligence of defendants to his injury. But this is an underestimate of the action of the trial court. The court was requested to instruct the jury that the effect of the assumption of risk by Williams incident to the use of the claw bar, and the circumstances under which it was used, was to relieve defendants from liability "for the injury resulting therefrom." The court refused the instruction as it was requested and amended it by adding thereto "and such fact [the assumption of risk] will be considered by you in determining the amount of plaintiff's recovery, if any, under all of the instructions."

The refusal and modification were assigned as error and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance and, if it existed, only constituted contributory negligence and could operate only in reduction of the amount of recovery, not defeat recovery. This was error as we have seen.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.